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## LORD CAMPBELL'S ACT.

The last number of the Ontario Law Reports contains the decision of the Court of Appeal affirming the judgment of a Divisional Court and of Chief Justice Falconbridge in the case of *McKeown v. The Toronto Railway Co.*, 19 Ont. L.R. 361, which carries the principle of Lord Campbell's Act considerably farther than any court has gone hitherto. In this case a parent recovered \$300 damages for the loss of a child slightly over four years of age, who was killed through the negligence of the defendant company.

In view of the importance of this decision, it is not surprising to find considerable diversity of opinion among the judges. Chief Justice Moss and Mr. Justice Maclaren dissented, and Mr. Justice Garrow gave a reluctant assent in the Court of Appeal; and, while Mr. Justice MacMahon concurred with his two colleagues in the Divisional Court, he is reported as saying, "I give a grumbling assent."

The majority in both courts followed the decision of a Divisional Court in *Ricketts v. Village of Markdale*, 31 O.R. 180, 610, in which the child killed was eight years old. That case, however, contained an important element which was wanting in the other. The judge who tried the case, without a jury, found as a fact that the child had already been of pecuniary benefit to his father and, as pointed out by Mr. Justice Robinson, there was good reason to assume that, had he lived, such benefit would continue and increase as had been the case with his older brothers. There is no such finding in the *McKeown* case, nor any evidence on which one could be based.

The jury's findings are given in the report. They found negligence by defendants, negatived contributory negligence and assessed the compensation at \$300. That is all. The judge's charge

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is not published, but there is nothing in the report to shew that their attention was especially called to the probability of the child, had he lived, being able to assist his father financially in the future and the importance of such expectation to the plaintiff's case. The only evidence, apparently, on which such expectation could be based is set out in the dissenting opinion of Moss, C.J.O., and will be referred to later.

Meredith, C.J., delivered judgment for the Divisional Court, and after dealing with questions of misdirection complained of, evidence as to negligence, the quantum of damages, and the point whether or not it is necessary in these cases to prove actual benefit received or if a reasonable expectation for the future is sufficient of itself, concludes as follows:—

“Though no reported case had been cited, nor have I found any, in which an award of damages has been made in the case of a child so young as the deceased child in this case, it is impossible to say that, as a matter of law, his being of such tender years precluded the plaintiff from obtaining the benefit of the Act, the provisions of which he is invoking by his action. All that can be said is that the younger the child is the more difficult it is to determine whether there is such a reasonable and well founded expectation of pecuniary benefit as can be estimated in money, and to estimate the damages which should be awarded; and there remains, as a insuperable difficulty in the way of the defendants' success, the fact that it was for the jury to determine both of these matters, there being, as I have already said, evidence proper to be submitted to them.”

Mr. Justice Osler says:—

“It is the extreme youth of the child for whose death this action is brought which alone causes hesitation in maintaining the plaintiff's right to recover. The damages recoverable under the Act cannot be founded on sentimental considerations, but are to be given in respect of some pecuniary loss only, and that not merely nominal, caused by the death. Here the child was an infant of four years of age, healthy, intelligent and with as good a prospect of prolonged life as any infant of that age can

be said to have. Was its death a damage to the parent within the meaning of the Act? Having regard to the position in life of the latter, I cannot hold that in point of law it was not, or that in the case of a child of that description damages to be estimated by such considerations as the decided cases warrant may not be sustained. The question is for the jury, upon the evidence."

The remainder of His Lordship's opinion deals with the question of the necessity to prove actual benefit received and that of the quantum of damages, except where he said, "I am on the whole of opinion that on the evidence a recovery is warranted by the rule or principle established in the *Pym* case, etc."

The only other opinion published, except that of Moss, C.J.O., in dissent, is by Mr. Justice Garrow, who starts by saying: "No case of authority in this province was cited, nor have I been able to find one, in which a recovery was had in the case of the death of a child so young (four years) as that of the plaintiff. The nearest is *Ricketts v. Village of Markdale*, 31 O.R. 610, in which the age was eight."

The next paragraph relates to actual benefit and he winds up as follows:—

"A reasonable prospect of future pecuniary benefit, although somewhat longer postponed, may not unreasonably be regarded as almost as certain in the case of a four year old child as in that of one twice that age. I at least am unable to see how it can be said that in the one case there is evidence proper for a jury and in the other none. If it appeared that the infant was a cripple or an imbecile, or if its age was so tender that there could be no reasonable evidence given of its mental or physical capacity or condition, it would be otherwise. But in the present case the evidence clearly discloses that the infant killed was a bright and capable boy, both mentally and physically, and I, therefore, agree, reluctantly I admit, that there was evidence which could not have been withdrawn from the jury; and the judgment must therefore be affirmed."

Their Lordships say there was evidence proper to be submitted to the jury. They must mean evidence of such "a reasonable and well-founded expectation of pecuniary benefit as

can be estimated in money," to quote from Sir William Meredith. In the judgment of Moss, C.J.O., at page 374 of the report, we have the evidence said to be sufficient. Summarized it is this. The child was healthy, noted for his intellectual abilities, and of use to his mother in several ways, "being able to go a message for her if necessary and other minor things in the house." That is all the evidence as to the child, and all that is known of the father is that he is a bookkeeper. His means or other resources are not further disclosed.

Then Mr. Justice Osler says that a verdict for the plaintiff is warranted by the principle established in *Pym v. The Great Northern Ry. Co.*, 2 B. & S. 750; *Franklin v. The South Eastern Ry. Co.*, 3 H. & N. 211, and a number of other cases which he cites. None of those cases, however, go so far as the one under discussion. They are all authority for the position that a reasonable expectation alone is sufficient, but in all except *Pym's* case actual benefit already received was proved. In *Pym's* case the question of future benefit was the only one. A man had been killed and his wife and children lost the educational and social advantages they would have enjoyed from his expenditure of an income of £4,000 derived from a life estate. It was held that damages could be given for such loss.

Taking the evidence adduced in the case so far as shewn in the report and considering the grounds upon which the learned judges who affirmed the verdict came to that conclusion, the position appears to be this: Given a healthy and intelligent child of any age, there is a reasonable probability that he will be of pecuniary benefit to his father in the future which will entitle the latter to compensation in damages if the child is killed through negligence. It does not go quite as far as counsel for the railway company suggested to the Court of Appeal, namely, to cover the case of an unborn child, because their Lordships seem to consider the health and intelligence of the child to be essential elements. But so soon as a healthy child is old enough to exhibit mental characteristics, if these prove to be of the proper calibre, all the conditions exist to give his parents a pecuniary interest in his life.

C. H. MASTERS.

***GOVERNMENT INSPECTION OF BANKS.***

Mr. McLeod, the General Manager of the Bank of Nova Scotia, has issued a pamphlet calling public attention to the necessity of some system of public inspection of our chartered banks, which seems a praiseworthy effort to provide some means whereby the interests of shareholders and others interested in such corporations may be more efficiently protected than they are at present.

The history of Canadian banks which have failed, will shew that banks entering on the downward path do not, as a rule, immediately go to ruin, the process is gradual, and is usually preceded by a resort to improper, not to say dishonest, methods and practices with the frantic hope that some lucky turn of fortune will redeem the situation, but this, after all, is nothing but the gambler's method of retrieving his fortunes, and as a rule it only results in plunging those who adopt that course more deeply in the mire.

The pamphlet speaks of various objections which have been raised against the independent inspection of banks, the only one, however, which seems at all formidable is that an inspection of accounts without a valuation of assets would be worthless.

It is quite true that a bank may on paper be made to appear perfectly solvent, when a proper valuation of its assets would shew the contrary. The remedy, however, for this is to provide that there shall be not only an inspection of accounts, but also a valuation of assets. It is said this cannot be done effectively except by officers of the bank, which seems to be likely, but then it should be competent for the inspectors to put such officers on oath as to such matters if thought necessary.

In England by 25-26 Vict. c. 89, s. 69, a special system of inspection of limited banking companies is provided for and can be made under the direction of the Board of Trade on the application of persons holding not less than one-third of the entire shares of the company.

The officers of the company are bound to furnish the inspectors with all the information in their power, to produce all

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books and documents required, and may be, if thought necessary, examined under oath. Officers refusing to produce books and answer questions are subject to a penalty of £5 for each offence.

The inspectors report to the Board of Trade, and their report is to be forwarded by the Board to the company and to members at whose instance the inspection was made. These latter persons have to defray the expense of the investigation.

But in addition to this provision for a special inspection at the instance of shareholders, the English Companies Act provides that every limited banking company must annually appoint an independent auditor, and in default of its so doing the Board of Trade may appoint one. No director, or officer, of the company is eligible for the office, but the auditor, however appointed, is to be paid by the company.

This mode of appointment hardly seems satisfactory, and in order to secure the entire independence of such officers, their remuneration should be fixed and paid by the government, who should be reimbursed by a tax to be levied on all chartered banks.

Mr. McLeod's proposal is to provide an inspection, as of course, without any special request of shareholders. He proposes that a board of fourteen auditors should be appointed by the Bankers' Association, and that the Board so appointed (four of whom are to be a quorum) shall make an annual inspection of each bank and if on such audit the annual statement to the shareholders is found to be a fair and conservative representation of the bank's affairs, the chairman of the Board of Auditors is to certify it, and no statement is to be issued without this certificate.

Mr. McLead does not propose to give the auditors power to get information from officers of the bank under oath. One of the English Acts above referred to gives that power, and the Insurance Act, R.S.C. c. 34, s. 36(3), gives that power to the inspector of insurance companies, and it is a power which the inspector of banks should also possess in order to enable them to make their work thorough and effective.

Mr. McLeod does not propose to give the auditors power to ally as a matter of course is preferable to leaving inspection to be made only on a special request of shareholders. As such a request is only likely to be made when suspicion has arisen as to the state of a bank's affairs, the result would often be a mere "shutting of the door after the horse is stolen." The present Bank Act recognizes that some information should from time to time be given to the government as to the condition of each bank's affairs, but experience has shewn that the bank returns have in some cases been unreliable. The proposal for inspection has for its object to check these returns and to insure as far as practicable, that they are faithful and accurate statements.

Mr. McLeod's proposals perhaps do not go far enough. They seem, however, to be clearly a step in the right direction and deserving of the careful consideration of the government.

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## Correspondence.

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### *THE DOCTRINE OF PROVINCIAL RIGHTS AS INTERPRETED IN ONTARIO.*

*To the Editor, CANADA LAW JOURNAL:*

Sir,—There is, we are glad to be able to say, some reason to believe that the firm stand which your journal has taken, on legal and constitutional grounds, in opposition to the policy pursued by the Ontario Government with regard to the supply of electric power has not been without its effect. The judgments of the courts, to which you have called attention, have made it very plain that though overruled by the despotic action of the Legislature and prevented from even hearing the complaints of those who appealed to them for redress, they had no doubt of the illegality of many of the proceedings which they have been compelled to uphold.

The recent case of *Felker v. The McGuigan Construction Co.*, in which the power of the Legislature to confiscate private property, if it chose so to do, is stated as being without any ques-

tion, as well as the inability of the court to interfere, has had a powerful effect in opening the eyes of the advocates of public ownership to the necessity of taking care that, in pursuit of that object, justice, as well as economy, is kept in view. The language of Chief Justice Falconbridge in giving judgment in the case referred to may well be taken as shewing the dangers to which the doctrine of provincial rights, unrestrained by any authority either of the courts of justice, or of a superior legislature, may expose the people of this country. He says:—

“We have heard a great deal recently,” the judge says, “about the jurisdiction of the province, a great deal of complaint about the exercise of its powers; but there is no doubt the highest authority has declared that within its own jurisdiction it is supreme; in fact, while it seems rather severe, I suppose there is not any doubt it has been conceded in recent cases that if the Legislature had chosen to confiscate—the word that is used—the farm of the plaintiff without any compensation they would have had a perfect right to do it in law, if not in morals.”

Public or municipal ownership of what are called public utilities may be something to be desired, but it must not be sought for at the expense of private property unless full compensation is awarded, nor in violation of contracts without the consent of all concerned, and not at all if a breach of any personal right, or denial of justice, is involved. In the attempt to carry out the scheme of the Hydro-Electric Commission every one of these principles is violated, and for this statement we have the unquestioned authority of the most eminent judges of the land.

The power of confiscation, so plainly referred to in the case of *Felker v. McGuigan*, conveys a very unpleasant idea to all but the confirmed socialist, who scoffs at the notion of private rights, and it has caused a decided change in the view of this question by one leading journal which has hitherto given an unhesitating support to the policy of the Ontario Government, but which now declares that the judgment above quoted “can-

not be read without the gravest misgivings." When those who in support of the plan of public ownership, and of opposition to "monopoly," have steadily upheld the most objectionable features of the government policy, and have had no fault to find with the legislation passed to uphold it; who have accepted with complacency the denial of justice to all who questioned the validity of such legislation, and have seen nothing wrong in the virtual confiscation of private rights though they are based upon a promise of protection by the same power which now threatens them with destruction; who have been content that the lives and property of our people should be liable to all the risks attendant upon the use of the most dangerous of nature's agencies—a risk, in a similar case, the Government of the Dominion had carefully guarded against by insisting on a fenced right of way—who have taken no heed of the warnings which the leaders of the financial world have given of the loss which the action of the Provincial Government was certain to cause by the injury to its credit, and consequent refusal of the capital necessary for the future prosperity of the country; who were willing that the Provincial Assembly should override the rights of municipalities, and declare valid contracts entered into in direct violation of its own previous enactments, and the judgments of the courts—when those who have so felt and acted begin to feel "grave misgivings" as to the result, there is some hope for the country.

It has now become evident that the doctrine of provincial rights is resolved into this—that the Provincial Legislatures, being supreme in their dealings with all subjects which, by the B. N. A. Act, are committed to their jurisdiction, may do, without let or hindrance, the most objectionable things they have done in this matter of electric power; may confiscate a man's farm without giving him any compensation, and may shut the courts of justice in his face—a right to which every British subject is supposed to be entitled.

After reading the judgment in the case of *Felker v. The McGuigan Construction Co.* the journal referred to may well say,

"it is not possible for any one schooled in British ideas of the sanctity of property to read that passage, and other passages of the learned judge's judgment, without a twinge." He should not indeed! The learned judge says, "if the Legislature had chosen to confiscate—the word that is used—the farm of the plaintiff *without any compensation* they would have had a perfect right to do it, in law if not in morals," or, as a learned judge had previously ironically remarked, "without being bound by the law which says, thou shalt not steal."

It is well that, at last, through the press, the note of alarm has been sounded, even in a quarter from which every encouragement has been given to those engaged in bringing about the danger now apprehended. We hope also that those members of the Legislature who have the courage to think for themselves will carefully weigh the responsibility which attaches to them before they undertake to exercise the enormous powers which they are now declared to possess.

Those who have made a study of this subject are not surprised that the Dominion Government has been asked to disallow the Hydro-Electric Commission Act of 1909 on the ground that the legalizing of the municipal contracts already adjudged to be illegal, the declaring that they shall not be open to question in any Court, and the staying forever of pending suits which would have succeeded in the courts, must have the effect of impairing the credit of the securities of Canada in the British market; and, I presume, on the further ground that the staying of actions is an infringement of the inherent right of every British subject, and affects the administration of justice, which is not included among the powers of provincial legislatures being of course a matter of Federal jurisdiction.

I enclose an article from the *Financial Post* of recent date, which I think states the case as to disallowance with much force, and which may have escaped your attention.

Shanty Bay.

W. E. O'BRIEN.

The article referred to by our correspondent is as follows:—

“The effect of the socialistic programme in Great Britain and the undue taxation proposed by the Liberal Finance Bills has been not merely to drive surplus funds for investment abroad, but having had experience of socialistic measures at home, the British investor will in the future scrutinize more closely the attitude of governments towards capital in the countries where he proposes to employ his money. Canada would naturally attract his first attention, but the country's reputation has unquestionably been tarnished by the legislation of the Ontario Government, which has in effect abrogated Magna Charta by closing the courts, in all matters relating to the municipal contracts of the Hydro-Electric Commission. Having been bitten by the mad dogs of socialism at home, the British capitalist will be careful to ascertain that there are none of these animals running amuck in the countries abroad. Ontario will not escape his scrutiny. When he finds that a government has entered into active competition with private companies without making any offer of purchase or compensation, and when in addition he finds this government overriding the action of the courts it will not be difficult for him to arrive at a conclusion unfavourable to many Canadian investments. The effect on the fair name of the country, that is to say, its credit, has already been considerable, but it takes time for its force to be felt in a pecuniary sense, especially when there has been a glut of money available for all purposes. The opportunity is now open to the Dominion Government to give Canada's credit at a most opportune time a notable uplift. If it disallows the oppressive, un-British and unconstitutional act of the Ontario Government it will prove to the world abroad that not only is our constitution on a sound basis, but that our regard for property and civil rights is securely fixed. If, on the other hand, the legislation is continued in force, the foreign investor will be unfavourably impressed by the system of government whereby the single chamber of a province can override all rights usually guaranteed by the British Constitution, and has the power of absolute confiscation without any means of recourse whatever on the part of those whose property has been confiscated.”

We have at present nothing further to add to what has been so well said by our correspondent and our contemporary.—ED.,  
C.L.J.

**REVIEW OF CURRENT ENGLISH CASES.**

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**NEGLIGENCE—PUBLIC HOSPITAL—LIABILITY OF GOVERNORS OF HOSPITAL—OPERATION—INJURY TO PATIENT—HOSPITAL STAFF.**

*Hillyer v. St. Bartholomew's Hospital* (1909) 2 K.B. 820 was an action brought by the plaintiff against the governors of a public hospital to recover damages for injuries sustained through the alleged negligence of the hospital staff while the plaintiff was undergoing an operation. The facts were that the plaintiff was placed on the operating table for the purpose of examination under an anaesthetic, and that his arms had been suffered to hang over its side; his left arm coming in contact with a hot water radiator projecting from beneath the table whereby it was burned and the upper part of his right arm being bruised by the operator or some other person pressing against it, the result of the injuries being traumatic neuritis and paralysis of both arms. Grantham, J., who tried the action held that the defendants were not responsible for the alleged negligence and he dismissed the action; and his decision was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.J.J.), who held that the hospital surgeons engaged in the operation, though employed by the defendants were not in the relation of servants, inasmuch as the defendants had no power or control over them in the way they exercised their duties, nor were they in any way bound to conform to the directions of the defendants in the discharge of their duties, and the only duty the defendants were under in the matter was to exercise reasonable care in the appointment of competent persons on their hospital staff. The nurses and carriers it was conceded stood in a somewhat different position to the surgeons, and though they were servants of the defendants for general purposes, yet when engaged in assisting at operations they ceased to be servants of defendants and were then under the control and orders of the surgeons.

**HUSBAND AND WIFE—MARRIED WOMAN—WEARING APPAREL OF WIFE PURCHASED BY HER—WIFE'S SEPARATE ESTATE—PARAPHERNALIA—MARRIED WOMAN'S PROPERTY ACT, 1882 (45-46 VICT. C. 75)—(R.S.O. c. 163, s. 5(2)).**

*Masson v. De Fries* (1909) 2 K.B. 831 was an action brought against a husband and wife for the price of wearing apparel furnished to the wife. The husband set up that he had supplied

his wife with sufficient money to buy apparel for cash and had never authorized her to buy goods on credit. In the result judgment was recovered against the wife alone and execution thereon was issued against her separate estate, and under this execution some dresses and other wearing apparel of the wife were seized, which were claimed by the husband as belonging to him as paraphernalia. An interpleader issue was directed to try the question of ownership. The issue was tried in a County Court and the judge directed the jury that on the authority of what was said by Jeune, P.P.D., in the case of *Tasker v. Tasker* (1895), P. 1, that they should find the issue in favour of the husband, which, "with regret" they accordingly did. From this decision an appeal was had to a Divisional Court who, thinking there was some evidence to support the finding of the jury, dismissed the appeal. The plaintiffs then appealed to the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.J.J.) who came to the conclusion that though the decision in *Tasker v. Tasker* was correct, the dicta of Jeune, P.P.D., which the County Court judge had quoted to the jury on the subject of paraphernalia were not correct, and they therefore allowed the appeal and found the issue in favour of the execution creditors. Jeune, P.P.D., as the Court of Appeal point out, had treated paraphernalia as being a subject of property by the husband, whereas it is a species of property which only arises in favour of a wife after her husband's death, whereby she becomes entitled to claim as her own, as against his estate, articles of personal use and apparel and ornament suitable to her station in life. Under the Married Woman's Property Act, goods purchased for herself by a wife, even though with money supplied by the husband, become the wife's separate property, and as such liable to execution against her separate estate.

WORKMEN'S COMPENSATION ACT, 1906—DEFENDANT—TRANSMISSION OF INTEREST OF DEFENDANT—ACTIO PERSONALIS MORITUR CUM PERSONA.

*The United Collieries v. Simpson* (1909) A.C. 383, although a case arising under the Workmen's Compensation Act of 1906, which has not been adopted in Ontario, is nevertheless deserving of attention inasmuch as the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, Shaw and Dunedin) have determined that under it the right of a defendant to compensation is a transmissible interest to which the maxim *actio personalis, etc.*, has no application, and that if a defendant die without making a claim, his or her personal representative is entitled to enforce

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the claim, provided it be made within the time limited by the Act. It seems probable that the same rule would hold good under the Fatal Accidents Act, R.S.O. c. 135. We may note that Lord Dunedin dissented.

**INSURANCE (LIFE)—ACCIDENT INSURANCE—CONDITION IN POLICY  
—REGISTRATION—CLAIM TO BE MADE WITHIN A YEAR OF REGIS-  
TRATION.**

*General Accident F. & L. Assurance Corporation v. Robertson* (1909) A.C. 404. This was an appeal from the Scotch Court of Session. The action was brought on an accident policy contained in a copy of Lett's Diary for the year 1906. By the terms of the policy it was provided that any person desiring to take the benefit of the policy must send an application to the defendants for registration, together with 6d., and that any claim on the policy must be made within a year of registration. It appeared that the defendants in fact kept no register, but as applications were received, within a few days they were put into packets and kept together until the time for making claims had expired. In the present case the insured sent in his application, dated December 25, 1905. This was delivered at the defendants' office on 26 December, 1905, which was observed as a holiday, and it was opened on the following day, and was then stamped as received on 27 December, 1905. On 29 December, 1905, a formal acknowledgment was made out but not sent to the insured until 3rd January, 1906. The insured was injured in a railway accident on 28 December, 1905, from which he died the next day. Notice of the claim was given by the plaintiff on 2nd January, 1906. The case therefore turned on what was meant by "registration," and the House of Lords (Lord Loreburn, L.C., and Lords Ashbourne, James, Gorrell and Shaw) agreed with the Court of Session that the sending of the letter of acknowledgment on 3rd January, 1906, must be taken as the date of registration, and therefore that the claim was made in time.

**LEASE—CONSTRUCTION—MINERALS—CLAUSE AGAINST WORKING  
ADJOINING MINERALS—ABSOLUTE PROHIBITION.**

*In Forrest v. Merry* (1909) A.C. 417 a mining lease was in question, whereby the defendants were empowered to work certain coal seams under certain lands, and by a contemporaneous agreement it was agreed that the lessees would work the coal under certain adjoining lands only to such extent as would enable them to pay £550, being the amount of fixed rents payable to the owners of such adjoining lands, and that if they exceeded

that amount they should pay 1d. per cwt. for the excess. The question was whether this amounted to an absolute prohibition from mining under the adjoining lands in excess of the £550, or whether it meant that the lessees were at liberty to mine as much as they pleased, paying for the excess the 1d. per cwt. The case caused some diversity of opinion. The Lord Ordinary held that the clause amounted to an absolute prohibition, and gave judgment in favour of the pursuers, but the Court of Session "recalled the Lord Ordinary's interlocutor and assailed the defenders," to use the technical language of Scots law, the Lord President dissenting. The House of Lords (Lord Loreburn, L.C., and Lords James, Atkinson, Gorrell and Shaw) agreed with the Lord Ordinary and the Lord President, and reversed the decision of the Court of Session, being of the opinion that the first part of the clause limiting the right of working to £550 would be nullified unless it were taken to imply a prohibition.

**RAILWAY COMPANY—STATUTORY POWERS—LIMITATION OF TIME  
FOR EXERCISE OF POWERS—COMPANY IN POSSESSION OF LAND—  
COMMON LAW RIGHT OF COMPANY.**

*Midland Ry. v. Great Western Ry.* (1909) A.C. 445. This case, known in the courts below as the *Great Western Ry. v. Midland*, is an appeal from the Court of Appeal (1908) 2 Ch. 644 (noted ante, p. 67). The House of Lords (Lord Loreburn, L.C., and Lords Ashbourne, Atkinson, Gorrell and Shaw) have affirmed the judgment of the Court of Appeal, on the ground that the plaintiffs were exercising their common law rights over their own land. As Lord Loreburn, L.C., succinctly puts it: "The point arising from the fact that the powers of the Great Western Railway Co. under their Act of 1896 expired in five years has no substance whatever. By the time those powers expired the company had become possessors of all the land that was needed, and also of a license, which, taken together, were sufficient to enable them to complete the works that were prescribed by the Act. . . In completing the junctions, even after the five years, the company were not resorting to the powers of the Act at all."

**WILL—POWER OF APPOINTMENT—EXERCISE OF POWER BY WILL  
MADE ACCORDING TO ENGLISH LAW, BUT INVALID ACCORDING TO  
LAW OF DOMICIL.**

*Murphy v. Deichler* (1909) A.C. 446. This was an appeal from the Irish Court of Appeal. By a will the testator gave a power of appointment by deed or will over a sum of £13,000. The donee of the power lived in Germany, where she had her domicil.

She made a will in accordance with English law in exercise of the power, but the will was invalid as a will according to German law. The question, therefore, arose whether it was a valid exercise of the power. The Irish Court of Appeal held that it was, and a good will for the purpose of the appointment, and that the document should be admitted to probate limited to the estate or interest of the testatrix, over which she had a power of appointment, although it was not admissible for other purposes. This decision the House of Lords (Lord Loreburn, L.C., and Lords Ashbourne, Atkinson and Shaw) affirmed, as being in accordance with long established usage.

**ADMIRALTY—SHIP—BILL OF LADING—EXCEPTION AND CONDITIONS  
—DAMAGE TO CARGO—SEAWORTHINESS—NEGLIGENCE OF SHIP-  
OWNERS.**

*Lyle v. The Schwan* (1909) A.C. 450. This is a case which has undergone various vicissitudes. The action was for damage to a cargo arising from alleged negligence of the shipowners. The damage arose from the fact that a three-way cock was inadvertently left open whereby an inflow of sea water took place, damaging the cargo. Deane, J., held that this was due to the negligence of the defendants' agents, for which they were liable (1908) P. 356 (noted ante, p. 66). The Court of Appeal reversed this decision, holding that there was no evidence of the ship being unseaworthy, and, so far as the damage in question arose from improper adjustment of the three-way cock, this was a defect of machinery, or a defect caused by the neglect of the engineer, against both of which, by the terms of the bill of lading, the defendants were protected: (1908) P. 356 (noted ante, p. 281). The House of Lords (Lords Atkinson, Macnaghten, James, Collins, Gorrell, Shaw and Loreburn, L.C.) have now unanimously reversed the judgment of the Court of Appeal and restored that of Deane, J. Lord Gorrell, who delivered the most elaborate judgment, sums up the turning point of the case thus: "Is a vessel seaworthy which is fitted with an unusual and dangerous fitting which will permit of water passing from the sea into her holds unless special care is used, and those who have to use the fitting in the ordinary course of navigation have no intimation or knowledge of its unusual and dangerous character, or of the need for the exercise of special care, and might, as engineers of the ship, reasonably assume and act upon the assumption, that the fitting was of the ordinary and proper character, which would not permit of water so passing, however the fitting was used? I think this question should be answered in the negative."

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REPORTS AND NOTES OF CASES.

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## Dominion of Canada.

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SUPREME COURT.  
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ONT.]

PITT v. DICKSON.

[Dec. 13, 1909.

*Action for deceit—False representations—Agreement for sale—Compromise—Release—Notice.*

P., living in Montreal, owned 15,000 shares in a Cobalt mining company and D., of Ottawa, also a shareholder, was looking after his interests in respect to them. Being informed by D. that the mine was badly managed and the property of little value, P. signed an agreement to sell his stock at par which D. assigned to a third party. Later P., believing he had acted imprudently in signing the agreement, entered into negotiations with the assignee and a compromise was finally effected by which 3,000 shares of his stock were sold to the latter at par, and the remainder re-transferred to P. It turned out that the assignee and D. were acting in collusion to get possession of P.'s stock and it having greatly increased in value, he brought action against D. for damages.

*Held*, reversing the judgment of the Court of Appeal and restoring that of a Divisional Court, which affirmed the verdict at the trial, that the said compromise having been effected when P. was ignorant of the real state of affairs he was not bound by it, and was entitled to recover from D. the difference between par value and the price at the date of the compromise. Appeal allowed with costs.

*Lafleur*, K.C., for appellant. *Chrysler*, K.C., and *Larmouth*, for respondent.

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N. S.]

[Dec. 13, 1909.

AINSLIE MINING &amp; Ry. Co. v. McDougall.

*Negligence—Employer and employee—Duty of employer—Proper system—Common employment.*

M. was working in a mine about 30 feet below the surface, the overhanging wall having an inclination of about 30 degrees.

To protect the workmen from stones and earth falling on them a scaffolding had been built about half way down by placing timbers across at intervals and covering them with poles with earth on top of the whole. Several tons of earth and rock fell from the top and crashed through the scaffolding, whereby M. was killed. In an action by his father against the company operating the mine, the jury found that the place for the men to work in was not safe.

*Held*, that the company had not fulfilled its primary obligation to provide a safe place for its workmen, and that the company itself being negligent the doctrine of common employment could not be invoked. Appeal dismissed with costs.

*Newcombe*, K.C., for appellant. *McNeill*, K.C., for respondent.

## Province of Ontario.

### COURT OF APPEAL.

Meredith, C.J.C.P., Teetzel, J., Riddell, J.] [Nov. 30, 1909.

*HORRIGAN v. CITY OF PORT ARTHUR.*

#### *Municipal corporations—Contracts—Powers of council.*

Appeal from judgment of CLUTE, J., on an application for an injunction restraining the defendants from exercising a contract with the Hydro-Electric Power Commission of Ontario.

*Held*, that when there is a statutory prerequisite to the taking of a vote in reference to a by-law whereon to found a contract to be made in pursuance of it, such by-law is invalid unless such prerequisite has been observed.

*H. Cassels*, K.C., for plaintiff. *Hellmuth*, K.C., for defendants.

Teetzel, J.] [Dec. 3, 1909.

*SASKATCHEWAN LAND & HOMESTEAD CO. v. LEADLEY.*

#### *Mortgage—Compound interest—Construction of covenant.*

A covenant in a mortgage read as follows: "That interest in arrear and premiums of insurance or other sums of money paid by the mortgagees for the protection of this security, such as taxes, repairs, or other incumbrances, and all costs, charges and expenses connected therewith, including the costs of any abortive

sale or sales, shall bear interest at the rate aforesaid, and shall be compounded half-yearly, a rest being made on the said first day of November and May in each year until all arrears of principal and interest and such other sums are paid, and that we will pay the same and every part thereof."

*Held*, that all moneys expended by the mortgagee for any of the matters above set forth, both before and after maturity of the principal money carried compound interest until repayment.

Further, that the principle laid down in *Popple v. Sylvester* (1882) 22 Ch. D. 98, applied; and that the case of *Imperial Trusts Co. v. New York Security and Trusts Co.*, 10 O.L.R. 289, was not applicable, as in that case there was no corresponding covenant.

*Kappelle, K.C., Cunningham and Russell Snow, K.C.*, for various parties.

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Teetzel, J.] RE DOWLING. [Dec. 3, 1909.

*Infant—Money improperly paid into court—Paying out.*

Application by the father of an infant for payment of money out of court standing to the credit of the infant. The money was paid in under the direction of a Surrogate judge upon the passing of the accounts of the executors of the will of the deceased testator. The bequest was of \$500 to the infant, "to be kept out at interest until he becomes of age—I devise William James Dowling to be paid the \$500 willed to his son, William Loyal, above, and he to be his guardian and to keep this money at interest as above mentioned."

*Held*, that this money was improperly paid into court. It should have been paid directly to the father of the infant pursuant to the terms of the will, and should be at once paid out to him, notwithstanding the general rule that money in court belonging to infants will not be paid out (except for their maintenance) until they have attained their majority.

*J. T. White, for applicant. J. R. Meredith, for infant.*

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Falconbridge, C.J.K.B., Teetzel, J., Riddell, J.] [Dec. 4, 1909.

*RYAN v. MCINTOSH.*

*Negligence—Horse left unattended on highway running away and causing injury—Trial by judge without a jury.*

The action was for damages for injuries sustained by the plaintiffs by reason of defendants leaving their horses unattended

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upon a highway, so that they ran away and ran into a waggon on which the plaintiffs were seated and so injured them. The case was tried without a jury and the trial judge found that there was no negligence and dismissed the action.

*Held*, unless that which the defendants did or failed to do was negligence *per se*, the judgment could not be disturbed, as the court should not interfere unless it was of the opinion that the trial judge (who tried the case without a jury) was clearly wrong, which in this case did not appear.

TEETZEL, J., dissented, being of opinion that the admitted facts established a clear case of negligence, having regard to the legal duty imposed upon every person who has charge of horses on a public highway to use reasonable and proper care and skill in their management and control, so as not to injure other persons using the highway.

*H. Thompson*, K.C., for plaintiffs. *J. M. Best*, for defendants.

NOTE.—The editor ventures to think that under the circumstances of this case the opinion of the dissenting judge was well founded so far as the question of negligence was concerned.

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Divisional Court, Chy.]

[Dec. 16, 1909.

SMITH v. CITY OF LONDON.

*Constitutional law—7 Edw. VII. c. 19—8 Edw. VII. c. 22 and 9 Edw. VII. c. 19—Municipal corporations carrying on a commercial business—Interference with private rights—Contracts between municipal corporations and the Hydro-Electric Power Commission—Legislative contracts—Remarks upon the character of this legislation.*

The plaintiff, a ratepayer of the city of London, brought action in June, 1908, to declare invalid a contract between the defendants and the Hydro-Electric Commission, and for an injunction restraining the defendants from acting thereon. The contract was executed on May 4, 1908, by the defendants and by some fifteen other municipalities in Western Ontario.

The authority under which these defendants executed the contract was a by-law submitted to the people under 6 Edw. VII. c. 15, carried and finally passed by the council on Jan. 14, 1907. It enacted "that it shall be lawful for the said mayor and clerk of the said corporation to execute a contract with the Hydro-Electric Commission of Ontario for the supply to the said corporation of

electric power or energy for the use of the corporation and the inhabitants thereof for light, heating and power purposes at from \$17.20 to \$23.50 per h.p. per annum ready to be distributed by the said corporation, such price to include all charges for interest, sinking fund, cost of construction and cost to operate, maintain, repair, renew and insure the plant, machinery and appliances to be used by the said Commission." The contract entered into was not in accordance with this by-law, but was for the purchase of power at Niagara Falls at a price dependent on voltage, and, in addition, to pay annually a proportionate part of the money expended by the Commission for the construction of transmission line and to bear a proportionate part of the line loss, cost to operate, maintain, repair, etc. On April 4, 1908, 8 Edw. VII. c. 22, was assented to, validating the different by-laws of the municipalities and setting forth a form of contract between the Commission and the corporations, and, when executed, the said contract was to be legal, valid and binding. Whilst this action was pending, 9 Edw. VII. c. 19 was passed, altering the contract by changing the parties thereto and making other variations and declaring the contract as varied to be binding on the defendants and the other corporations named therein, and executing the same on behalf of the town of Galt, and declaring that the contract as so varied should be conclusively deemed to be a contract executed by the various corporations and further declaring that these corporations should be conclusively deemed to have entered into such contract with the Commission; and, by s. 8, every action which had been theretofore brought and was then pending wherein the validity of the said contract or any by-law is attacked or called in question, or calling in question the jurisdiction, power or authority of the Commission or of any municipal corporation or councils thereof to exercise any power or to do any of the acts authorized to be exercised or done by the Commission or by any municipal corporation or the council thereof, "shall be and the same is forever stayed."

*Held.* 1. Both by-law and contract would have been open to successful attack in the courts, but for their legislative validation.

2. That it is open to the court, notwithstanding the wide language used as to staying proceedings, to take cognizance of the legislative competence to deal with the whole subject-matter. If these statutes were found to be beyond the powers of the provincial legislature it was the duty of the court under the British North America Act so to adjudicate and determine.

It was urged that electric energy being a commodity, becomes, if traded in, a subject of "trade and commerce," and that no municipality could carry on such a commercial undertaking or interfere with the rights of individual inhabitants as to private lighting. Also that the electors even by unanimous vote could not warrant such legislation; it was never intended under the British North America Act that municipal institutions should carry on such a commercial undertaking.

*Held,* 1. That these Acts upon their faces by their very details claim to be classified under the heading "municipal institutions in the province." (See British North America Act, s. 92(8).) They deal with the transmission of electricity from Niagara Falls to and through various municipalities, making it available for all municipal corporations to apply. The installation of an electric plant in the city of London would be per se a local work or undertaking, a matter of merely a local or private nature of the province. Such legislation in England always falls under the heading of "local Acts." The supplying of light, whether by gas or other illumination, is a proper function of municipal administration, and so to hold does not at all infringe upon the meaning of "trade and commerce" where exclusive powers are conferred upon the Dominion to legislate as to regulation of trade and commerce. Sec. 92(2). These words would point to political arrangements with regard to trade requiring a sanction of Parliament. Regulation of trade in matters of inter-provincial concern and the like as indicated in *Citizens Insurance Co. v. Parsons*, 7 App. Cas. 110.

2. In reference to the proposition advanced that the supply of house light is a purely private matter and that no public body can interfere with a right of a man to use any kind of light he pleases, and that there is no right to tax him for the supply of special light to other people, the court said: "In regard to electric light to be made from power transmitted from Niagara Falls the following considerations enter into the question. The individual cannot procure his own supply, it has to come to him by means of material conveyance over private and public property. The transmission and storing of electric energy necessitates a system of control and regulation for the interest of public and private safety and exclude the undertaking from the area of private enterprise and ordinary business."

3. As to whether the plaintiff, as a ratepayer of the city, has a right to be heard in seeking relief after the validation of the contract, the court said:—"He starts with a good cause of action.

The terms of the contract being changed after the vote, *prima facie* the vote has been cast away, and there is no valid contract which binds the ratepayers, and the levy of rates based on contract and by-law is illegal. Then comes the special Act with double aspect, not only validating everything, but closing the courts against the aggrieved ratepayers. The legislature, instead of letting the people vote again on the changed by-law, have in effect assumed or declared that no vote is necessary and no court can change the situation. The legislative action is no doubt a violation *pro tanto* of the principle of local self control, and is somewhat of a reversion to an older type of paternal or autocratic rule. But whatever be its character or effect the investigation is not for the courts."

Action dismissed, no order as to costs, but there may be a declaration that the several Acts are *intra vires*.

*Johnston*, K.C., and *McEvoy*, for plaintiff. *DuVernet*, K.C., and *Lefroy*, K.C., for defendants. *Cartwright*, K.C., for the Attorney-General of Ontario.

NOTE.—It was apparently assumed that the various Acts had reference only to power from Niagara Falls, whereas in fact the legislation is of general character, applicable to the whole province.)

#### COUNTY COURT—STORMONT, DUNDAS AND GLENGARRY.

Liddell, Co. J.]      BLONDIN *v.* SEGUIN.      [Oct. 16, 1909.

*Sale of goods—Diseased animal—Caveat emptor—Implied warranty.*

The defendant sold a cow to the plaintiff who inspected it before purchase. When slaughtered it was discovered that the animal had tuberculosis and the carcase was confiscated by the government inspector. The sale was without express warranty as to quality or condition.

*Held*, that as there was no warranty of the quality or condition of the animal, or that the meat was wholesome and fit for food, and as the purchaser bought after examination and inspection he could not recover back his money as for a consideration that had failed. Judgment for the defendant without costs. See *Emmerton v. Mathews*, 7 H. & N. 858; *Burnby v. Bollett*, 16 M. & W. 644; *Ward v. Hobb*, 4 App. Cas. 13; *Benjamin on Sale*, 7th Am. ed., p. 691.

## Province of Nova Scotia.

### SUPREME COURT.

Full Court.] [Dec. 9, 1909.

KENDALL v. SYDNEY POST PUBLISHING Co.

*Newspaper—Criminal libel—Perverse verdict—New trial.*

The publication in a newspaper of an article charging that the person referred to withdrew his name from the convention of persons assembled to nominate a candidate to represent the county, for a consideration, and that for such consideration he agreed to support another candidate imputes a criminal charge within R.S.C. c. 6, s. 265, and where such publication is clearly proved and the meaning of the words is clear, the only question for the jury is that of damages, and if, under such circumstances, they return a verdict for the defendant a new trial will be ordered with costs.

Mellish, K.C., for plaintiff. W. B. A. Ritchie, K.C., and O'Connor, for defendant.

Full Court.] ST. MARY'S SOCIETY v. ALBEE. [Dec. 11, 1909.

*Landlord and tenant—Construction of lease—Liability for taxes—Eiusdem generis.*

Plaintiffs were owners of a building part of which was occupied exclusively for the purposes of the society and part of which was let from time to time for public entertainments and purposes other than those of the society. The portion of the building occupied exclusively by the society was exempted from taxation but in respect of that portion used for public purposes the society was assessed on a valuation of \$1,000. The latter portion was leased to defendants for a term of years and it was provided in the lease that defendants should pay "any and all license fees, taxes or other rates or assessments which may be payable to the city of Halifax or chargeable against said premises by reason of the manner in which the same are used or occupied by the lessees hereafter . . . the said lessor, however, agreeing to continue to pay as heretofore all the regular and ordinary taxes, water rates, and assessments levied upon or with respect to said premises." After the making of the lease the valuation for assessment purposes of the portion of the premises occupied by defendants was increased from \$1,000 to \$10,000.

*Held*, (1) per TOWNSHEND, C.J., GRAHAM, E.J., and DRYSDALE, J., that the increased assessment came under the class of regular and ordinary taxes and assessments and that defendants were not liable therefor.

(2) The rule *eiusdem generis* applied in full force, and the kind or class of taxes which defendants bound themselves to pay being "all license fees or other rates or assessments chargeable by reason of the manner in which the premises are used or occupied by defendants," the "regular and ordinary taxes, etc.," which plaintiff bound itself to pay could not be placed in that category.

(3) There was no ambiguity in the language used and parol evidence should not have been admitted.

*O'Connor*, in support of appeal. *Mellish*, K.C., contra.

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Full Court.]

[Dec. 11, 1909.

TRUSTEES OF SCHOOL SECTION No. 8 RICHMOND v. LANDRY.

*Amendment—Adding and striking out parties—Statement of claim.*

The plaintiff school section brought an action to recover land but subsequently gave instructions to have the action discontinued. This was opposed by M. a ratepayer of the section, who applied to be made a party plaintiff, and obtained an order to that effect from a master of the court.

*Held*, that the order could not be supported, but that the court, in the exercise of its power of amendment, under the circumstances disclosed, would direct an amendment adding M. as a plaintiff, suing on behalf of himself and other ratepayers, and also adding the Attorney-General, if his consent could be secured, as a plaintiff on the relation of M., and striking out the trustees as plaintiffs and joining them as defendants, and giving leave to file a new statement of claim appropriate to the circumstances.

*W. B. A. Ritchie*, K.C., in support of appeal. *Wall*, contra.

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Full Court.]

THE KING v. FRANEY.

[Dec. 11, 1909.

*Canada Temperance Act—Irrregularity in service of summons—Conviction set aside—Code, s. 658, sub-s. (4)—Certiorari.*

On motion for a writ of certiorari to remove a conviction for a violation of the Canada Temperance Act it appeared that the

writ of summons which was dated July 26th, 1909, and was returnable two days later was served by a constable who delivered it to a brother of defendant, the defendant himself being absent from home at the time. The affidavit of the constable shewed that the summons was served on the evening of the same day on which it was dated, between the hours of nine and ten o'clock, and that the person to whom it was delivered was of sufficient age, but it was not made to appear that such person was an "inmate" of defendant's last or most usual place of abode, the affidavit merely stating on this point that he stayed there most of the time.

*Held*, that the service was sufficient in point of time but that in the absence of evidence to shew that the summons was delivered to the defendant personally, or, in his absence, to an inmate of his last or most usual place of abode as required by the Code s. 658, sub-s. (4), the conviction must be set aside.

*W. B. A. Ritchie*, K.C., in support of application. *Roscoe*, K.C., contra.

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Full Court.]            HUTCHINS v. McDONALD.            [Dec. 11, 1909.

*New trial—Irregular act on part of foreman and member of jury—Costs.*

On the trial of an action claiming damages for negligence on the part of defendant in connection with the running of his automobile on a public street whereby plaintiff's husband while proceeding along the street on his bicycle was knocked down and received injuries which caused his death, the foreman and one other member of the jury, without the consent of the parties and without the order of the court or judge, viewed the locus and made experiments with an automobile for the purpose of gathering information to be used by them in connection with the trial. The jury having found a verdict for plaintiff, and the facts having been brought to the notice of the court by affidavit,

*Held*, that there must be a new trial; and that costs of the appeal should be defendant's costs in the cause.

*Mellish*, K.C., and *O'Mullin*, in support of appeal. *W. B. A. Ritchie*, K.C., contra.

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Full Court.]

[Dec. 11, 1909.

ATTORNEY-GENERAL OF CANADA *v.* SAM CHAK.

*Chinese Immigration Act—Recovery of penalty—Jurisdiction of stipendiary magistrate—Powers of Dominion Parliament in respect to—Certiorari—Procedendo—Costs.*

On application to quash the judgment of a stipendiary magistrate removed into this court by certiorari, in an action brought before the magistrate to recover the head tax of \$100 payable by a person of Chinese origin on entering Canada, R.S.C. c. 95, s. 7,

*Held*, dismissing the application with costs and ordering a procedendo,

1. It is competent for the Parliament of Canada to confer upon a provincial court (stipendiary magistrate's) having jurisdiction in respect to matters of debt not exceeding \$80 jurisdiction in respect to amounts above that sum. *Attorney-General v. Flint*, 16 S.C.R. 707; *Valin v. Langlois*, 5 App. Cas. 114; *The King v. Wipper*, 34 N.S.R. 202, followed.

2. Where the procedure of the court provides for trial by jury and the use of a jury is not inappropriate in the case the employment of the jury is not ground for attacking the judgment of the magistrate.

Per RUSSELL, J., parliament in making use of the court must be understood to have adopted its procedure. In any case the point as to the use of the jury was not open, not having been taken in the notice of motion for the certiorari. (Crown Rule 33.)

*O'Connor and F. McDonald*, in support of application. *MacIlreith*, contra.

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Full Court.]

[Dec. 11, 1909.

CHENG FUN *v.* CAMPBELL.

*Arrest—Liability of person preferring charge—Damage—Costs.*

A number of persons of Chinese origin who were suspected of attempting to enter Canada without payment of the head tax, in contravention of the provisions of the Chinese Immigration Act, R.S.C. c. 95, were arrested by a constable without a warrant and were detained for a time in the lockup. This was done at the instance of defendant a preventive officer, who was acting under instructions received from the collector of customs. Subsequently there was an information made by defendant and a warrant

issued and a preliminary investigation held, as the result of which plaintiff with seven other persons was committed for trial. He elected to be tried before the judge of the County Court and was convicted and sentenced to pay a fine of \$100, which was paid. The conviction was afterwards set aside, on a case stated for the opinion of this court, and the return of the fine ordered. Plaintiff thereupon brought an action claiming damages for false imprisonment, in connection with his detention without a warrant, and the trial judge awarded him as part of such damages the sum of \$100 paid as a fine under the judgment in the County Court, and the sum of \$16 additional for legal and other expenses.

*Held*, that while defendant might be responsible in damages for the detention up to the time of the issue of the warrant he was not responsible after that in the absence of evidence of direct interference on his part; that he was not liable in respect to the fine which never reached him and that his appeal, to that extent must be allowed with costs. That the additional amount of \$16 allowed plaintiff for damages was not unreasonable under the circumstances and with respect to that amount the appeal must be dismissed with costs, costs to be set off.

*MacIlreith*, in support of appeal. *O'Connor* and *F. McDonald*, contra.

Full Court.]

[Dec. 11, 1909.

SAM CHAK v. CAMPBELL.

*Chinese Immigration Act, R.S.C. c. 95—Arrest for attempted evasion of—Absence of warrant—Liability of officer causing arrest—Verdict—Entry of amended—Costs.*

Plaintiff was arrested on the 30th August, 1907, at the instance of defendant, a preventive officer, acting under instructions from the collectors of customs for an attempted evasion of the provisions of the Chinese Immigration Act, R.S.C. c. 95, and was detained for some days in custody without a warrant having been issued and without having been brought before a magistrate for examination. Plaintiff brought an action claiming damages for such arrest and detention on the trial of which the learned judge directed the jury, among other things, that defendant was only liable from the time he preferred a charge against plaintiff, which was on the 6th day of September. The jury came into Court and the foreman announced that they found a verdict for defendant and handed in a memorandum

to that effect. On another piece of paper handed in, signed by the foreman but not attached to the verdict was a memorandum to the effect that the jury found that plaintiff was entitled to \$1 a day \$7, and that his solicitor was entitled to the sum of \$40 for securing his release. This the learned trial judge treated as a verdict for plaintiff and ordered judgment accordingly in favour of plaintiff for the sum of \$47 with costs to be taxed.

*Held*, setting aside the verdict and ordering a new trial, with costs that the only matter in respect to which defendant could be held liable was the detention between the date of the arrest and the date (6th September) when the charges were laid before the magistrate, or whether plaintiff having been arrested (justifiably) without warrant was not held an unreasonable length of time before being brought before the magistrate.

Also that defendant was entitled to costs of his application to have the entry of the verdict made in accordance with the oral announcement of the jury and the entry thereof made by the prothonotary.

*MacIlreith*, in support of appeal. *O'Connor* and *F. McDonald*, contra.

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Full Court.]                   ANGLE v. MUSGRAVE.                   [Dec. 22, 1909.

*Will—Proof of where executed in Quebec—Witnesses and Evidence Act, R.S. 1900, c. 163, s. 27—Mense profits—Recovery of—Amount—Cross-appeal—Failure to take.*

In an action to recover land and for mense profits plaintiff claimed as devisee under the last will of B. who was proved to have died at Quebec, April 28th, 1907. On the trial a copy of the will was produced from which it appeared that the original was subscribed by testator in the presence of two notaries public who signed it in his presence and in the presence of each other;

*Held*, TOWNSHEND, C.J., that this was in all respects a sufficient compliance with the Wills Act, and sufficient to pass real estate in this province, and that the copy of the will produced at the trial was sufficiently proved under the Witnesses and Evidence Act, R.S. (1900), c. 163, s. 27, which provides that "a copy of a notarial act or instrument in writing made in Quebec before a notary public, and certified by a notary or prothonotary to be a true copy of the original, thereby certified to be in his possession—shall be received in evidence—and shall have the same force and effect as the original would have if produced and proved."

2. With respect to mense profits, plaintiff, who was a devisee, could not recover for profits which accrued to the testator, but was only entitled to recover for those which accrued during the period of his own title.

3. Although the court were of opinion that plaintiff was entitled to recover a larger sum than was allowed him by the trial judge, as there was no cross-appeal judgment must remain at the sum fixed below.

*O'Connor*, in support of appeal. *D. A. Hearn*, K.C., contra.

Full Court.]

[Dec. 22, 1909.

**THE KING v. SIMMONDS.**

*Intoxicating liquors—Incorporated club—Sale by steward to members illegal.*

Defendant, the steward of an incorporated club, was charged before the stipendiary magistrate of the city of Halifax with an offence against the Nova Scotia Liquor License Act. It appeared from the evidence that the liquor alleged to have been sold was the property of the club and was sold by defendant in his capacity of steward, at a fixed tariff rate to members only. On a case stated for the opinion of the court,

*Held*, 1. Distinguishing the case from *Graff v. Evans* and other cases of a like character, that the legal entity in this case was distinct from the shareholders and that the supplying to members at a tariff rate of the goods of the corporation could not properly be said to be a distribution among the shareholders of their own property.

2. The supplying of the liquor under the circumstances mentioned could not mean any transaction known to the law except that of a sale, and for this reason the conviction should be affirmed.

*O'Connor*, for the prosecutor. *O'Hearn*, for defendant.

Full Court.]

**THE KING v. BUCHANAN.**

[Dec. 22, 1909.

*Public schools—Election of trustees—Abortive meeting—Powers of district board—De facto officers—Trial judge—Finding on questions of fact—Courses and distances—Uncertainty of.*

Under the provisions of the Public Instruction Act, R.S. (1900), c. 52, s. 37, when the annual meeting of the district fails

to elect trustees to fill vacancies, the district board may, upon the written requisition of five ratepayers, accompanied by a certificate from the inspector of schools that the alleged vacancies actually exist, appoint a trustee or trustees.

*Held*, per RUSSELL, J., MEAGHER, J., concurring, GRAHAM, E.J., dissenting, that the presentation of a certificate in writing from the inspector was a prerequisite to the exercise of the power of appointment on the part of the district board.

*Held*, nevertheless per RUSSELL, J., that as there were no other persons than those whose title to the office was attacked who could claim to have been elected, and as there was no machinery by which any persons other than the de facto trustees could have been elected, the court should refuse the application and confirm the judgment of the trial judge, but without costs to defendants, they having failed to establish any legal title to the office.

Where a new school section was constituted and it became necessary to elect trustees, but the meeting called for that purpose was adjourned without having accomplished the purpose for which it was called.

*Held*, 1. There was nevertheless a meeting within the words of the statute sufficient to give jurisdiction to the district board to make the appointments which the meeting had failed to make.

2. The validity of certain of the votes cast for one or the other of two candidates being largely a question of fact depending upon the location of certain lines, the finding of the trial judge on such question should not be disturbed.

3. Per GRAHAM E.J., that where the description in determining the right of certain ratepayers to vote, depended upon courses by compass which were uncertain, the special description of the men by name, which was certain, should be taken.

*O'Connor*, in support of appeal. *Mackay*, K.C., contra.

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Full Court.]

[Dec. 11, 1909.

CHAPPELL BROS. & CO. v. CITY OF SYDNEY.

*Municipal corporation—Liability on contract for plans and specifications—Construction of Act—Architects—Remuneration where work not proceeded with.*

By a special Act of the Legislature of Nova Scotia (Acts of 1903, c. 169), reciting the gift to defendant of the sum of \$15,000 for the erection of a library building on certain conditions, including the providing of a site for the building and a yearly sum

of money for its support and maintenance and that such gift had been accepted and the required expenditures approved of by the ratepayers, defendant was authorized to include in its estimates of expenditure extending over several years the amount required for the purchase of the site for the building, and also, for all time, the sum of \$1,500 annually for its support. Plaintiffs were employed to prepare plans and specifications for the building and did so, but the project was abandoned and plaintiffs claimed payment of the sum of three per cent. on the estimated cost of the building as compensation for the work done by them.

*Held*, TOWNSHEND, C.J., dissenting, 1. While there was no specific declaration in the enacting part of the statute that defendant was empowered to erect the building, looking at the whole act, such power must be considered to be impliedly given and concluded defendant's liability to plaintiffs for the work done by them.

2. The plaintiffs, on the evidence, were entitled to recover the full amount of the percentage as claimed, and that the judgment in their favour below for a smaller amount must be varied by being increased to the full amount, and defendant's appeal dismissed with costs.

*O'Connor and F. McDonald*, in support of appeal. *Covert*, K.C., contra.

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## Province of Manitoba.

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### COURT OF APPEAL.

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Full Court.]            *ROYCE v. MACDONALD.*            [Nov. 29, 1909.

*Limitation of actions—Real Property Limitation Act, R.S.M. 1902, c. 100, ss. 17, 24—Sale of land for taxes—Right of municipality to sell after ten years.*

Appeal from decision of MACDONALD, J., 45 C.L.J. 530, allowed with costs, the court holding—

*Held*, 1. Statutes of Limitation apply to municipal and other corporations as well as to persons. *Hornsey Local Board v. Monarch, etc., Society*, 24 Q.B.D. 1, and Wood on Limitations, 118, followed.

2. Sec. 24 of the Real Property Limitation Act, R.S.M. 1902, c. 100, applies to proceedings taken by a municipality to sell

lands for taxes which are a lien or charge on the land, and the municipality will be restrained by injunction from taking such proceedings after the lapse of ten years from the time when the taxes fell due. *Neil v. Almond*, 29 O.R. 63, and *McDonald v. Grundy*, 8 O.L.R. 113, followed.

3. The plaintiff is also entitled, under s. 17 of the Act, to a declaration that neither the levy of taxes nor the rate remains any longer a lien or charge on the land.

*Andrews*, K.C., and *F. M. Burbidge*, for plaintiff. *Haggart*, K.C., for defendant.

Full Court.]      PATERSON *v.* HOUGHTON.      [Nov. 29, 1909.

*Vendors and purchasers—Option to purchase—Time essence of contract—Clause giving vendor power to cancel if payment not made within time fixed.*

An offer, though made for valuable consideration, to sell and convey land on payment of \$500 to be made on or before a fixed date only gives an option to purchase which cannot be exercised as of right after the time limited, and the addition of a clause providing that, if the payment is not then made, the vendor shall be at liberty to cancel the agreement confers no additional right upon the proposed purchaser, so that the vendor may refuse a tender of the money subsequently made, although he has given no notice and has done no positive act of cancellation. *Dibbins v. Dibbins* (1896) 2 Ch. 348; *Weston v. Collins*, 11 Jur. N.S. 190; *Waterman v. Banks*, 144 U.S. 394, and *Dickinson v. Dodds*, 2 Ch. D. 463, followed.

RICHARDS, J.A., dissented, holding that the added clause meant that the option was to remain open to acceptance for a reasonable term until cancelled in some way by the proposed vendor.

*O'Connor and Hartley*, for plaintiff. *Macneill*, for defendant.

Full Court.]      ADCOCK *v.* FREE PRESS.      Dec. 13, 1909.

*Costs—Security for costs—Practice—Libel action—Libel Act, R.S.M. 1902, c. 97. s. 10—King's Bench Act, Rules 978, 982, 983, 987—7 & 8 Edw. VII. c. 12, s. 1—Dismissal of action.*

Judgment of MACDONALD, J., 45 C.L.J., p. 756, affirmed with costs except the provision in the order for dismissal of the action in this event of non-compliance.

Rules 982, 983 and 987 of the King's Bench Act must be read with s. 10 of the Libel Act, but not Rule 978, so that there would have to be a substantive application to dismiss after non-compliance with the order.

*Blackwood*, for plaintiff. *Ormond*, for defendant.

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Full Court.]            *HOTCH v. ROTHWELL.*            [Dec. 14, 1909.

*Local option by-law—Liquor License Act, R.S.M. 1902, c. 101, s. 62, as re-enacted by 9 Edw. VII. c. 31, s. 2—Petition to council for submission of by-law—Using petition of previous year not then acted upon—Injunction to prevent submission of by-law.*

Appeal from judgment of METCALFE, J., 45 C.L.J., p. 723, allowed with costs.

There was no sufficient irregularity in making use of the previous year's petitions to have the effect of destroying it, and there were enough names on it, notwithstanding that part of the territory had, in the meantime, been taken to form a separate village.

*Andrews*, K.C., and *F. M. Burbidge*, for applicant. *E. L. Taylor*, K.C., for defendants.

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Full Court.]            [Dec. 13, 1909.

*MCCORMICK v. CANADIAN PACIFIC RY. Co.*

*Jury trial—Action for compensation for death by accident—Discretion of judge as to mode of trial.*

The Court of Appeal will not interfere with the discretion of the judge in granting or refusing an application, made under sub-s. (b) of s. 59, of the King's Bench Act, for the trial of an action by a jury, unless that discretion has been exercised upon a wrong principle as in *Jenkins v. Bushby* (1901) 1 Ch. 484. *Swindell v. Birmingham Syndicate*, 3 Ch. D. 127, and *Rustin v. Tobin*, 10 Ch.D., at p. 565, followed.

*Trucman*, for plaintiff. *Curle*, for defendants.

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KING'S BENCH.

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Macdonald, J.]            LARKIN v. POLSON.            [Nov. 19, 1909.

*Local option by-law—Petition of twenty-five per cent. of electors, sufficiency—Several petitions made into one by cutting off headings—Injunction against submission of by-law.*

A number of separate petitions for the submission of a local option by-law under s. 62 of the Liquor License Act, R.S.M. 1902, c. 101, as re-enacted by 9 Edw. VII. c. 31, s. 2, containing signatures of more than the required number of the resident electors, were received by the clerk of the municipality, who handed them back to the person presenting them to carry out a suggestion as to how they should be put together. The latter then made the many petitions into one by cutting off the headings from all but one and putting all the signatures after the one heading left.

*Held*, distinguishing *Adams v. Woods*, 45 C.L.J., p. 722, that such subsequent mutilation of the original petitions would not of itself be sufficient to warrant an injunction against the submission of the by-law.

Two of the headings thus cut off, however, were altogether insufficient as petitions under the Act and, although the number of the signatures to these imperfect petitions could not, as a result of the mutilation, be definitely ascertained, it was believed by the judge that there was not the necessary percentage of the electors on the remaining petitions.

*Held*, that everything should be presumed in odium spoliatoris and the finding should be that there were not enough signatures to uphold the petition, and that an injunction should be issued to prevent the submission of the by-law.

Appeal to the Court of Appeal December 8, dismissed with costs.

*Andrews*, K.C., and *F. M. Burbidge*, for plaintiff. *Taylor*, K.C., for defendants.

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Mathers, J.]            HOWARD v. LAWSON.            [Dec. 2, 1909.

*Practice—Substitutional service—Publication of notice of advertisement—Motion for final judgment—King's Bench Act, Rules 182, 183.*

Motion for final judgment, after interlocutory judgment in default of defence, in an action for a declaration that certain

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property standing in defendant's name in the Land Titles Office was held by him as a bare trustee for the plaintiff and for an order, *inter alia*, vesting the title of the property in the plaintiff.

Plaintiff had obtained and acted upon an order of the referee providing for service of the statement of claim by advertisement published in a Winnipeg daily newspaper, but his material shewed that, if the notice had been published in either of two localities in the United States, it would have been more likely to come to the knowledge of the defendant. Plaintiff had conveyed his interest in the land to the defendant by an assignment absolute in form, reciting payment of the sum of \$1,500 therefor, and there was no evidence or corroborating circumstances brought forward in support of the allegations in the statement of claim.

*Held*, notwithstanding the very wide provisions of Rules 182 and 183 of the King's Bench Act, that, when service by publication is asked, it should not, as a rule, be granted unless there is some reason for believing that the advertisement will come to the knowledge of the defendant: Annual Practice, 1910, 64-66; that in the present case the probabilities were that the action had never come to the defendant's notice, and that, in the exercise of the caution that the court should observe when it is asked to take the property which apparently belongs to one man and vest it in another, the motion should be refused.

*Fillmore*, for plaintiff.

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Macdonald, J.]                    **KELLY v. KELLY.**                    [Dec. 13, 1909.

*Partnership—Profits made by one partner in private speculations with partnership funds.*

*Held*, 1. Under s. 32 of the Partnership Act, R.S.M. 1902, c. 129, each partner must account to the firm for all profits from investments made or speculations entered into with the funds of the partnership by him without the consent of the other partners, although he might have been entitled, on a division of profits, to withdraw as his share more than the amount so used by him.

2. Under s. 24 of the Act, which provides that "unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm," the "contrary intention" must be that of all the partners and not that of only one.

*O'Connor and Blackwood*, for plaintiff. *Metcalfe and Minty*, for defendant.

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Metcalf, J.] MOORE *v.* MCKIBBIN. [Dec. 11, 1909.

*Local option—By-law to repeal, submisison of—Petition, sufficiency of.*

It is no objection to a petition under s. 74 of the Liquor License Act, R.S.M. 1902, c. 101, as re-enacted by 9 Edw. VII. c. 34, s. 4, for repeal of a local option by-law, that most of the signatures are on separate sheets of paper pinned to the one containing the heading and some of the signatures, although no portion of the petition appears upon such added sheets, unless it is shewn that such sheets were not attached to the first one at the time the signatures were made thereon. *Adams v. Woods*, noted vol. 45, p. 722, distinguished, as in that case a number of the sheets attached had been mutilated by cutting off the headings before presentation to the council.

*Maclean*, for plaintiff. *Rothwell* and *F. M. Burbidge*, for defendants.

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Macdonald, J.] JOHNSON *v.* CHALMERS. [Dec. 20, 1909.

*Garnishment—Error in form of affidavit—Substitution of words “to the like effect” for words in form.*

The substitution, though by an error in type-writing, of the word “jointly” for the word “justly” in an affidavit to lead a garnishee order is not cured by Rule 760 of the King’s Bench Act, permitting the use of language “to the like effect” of the forms prescribed, and is such a defect as cannot be amended; but the use of the word “deductions” instead of “discounts” in such an affidavit is permissible under the Rule, as the two words mean practically the same thing in that connection.

*Jamieson*, for plaintiff. *Blake*, for defendant.

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Mathers, J.] SUTTON *v.* HINCH. [Dec. 20, 1909.

*Covenant—Liability of covenantor to covenantee after assignment of covenant.*

B. assigned to C. an agreement by A. to purchase land from B. and to pay for same by instalments. B. also guaranteed to C. the payment by A. of the several instalments.

*Held*, distinguishing *Cullen v. Rinn*, 5 M.R. 5, that B. could not recover from A. the amount of an instalment overdue under the agreement, though he might ordinarily have asked the court

to compel A. to pay C. under *Ascherson v. Tredegar Dry Dock Co.* (1909), 2 Ch. 40.

*Galt*, K.C., for plaintiff. *Hoskin*, K.C., and *Huggard*, for defendant.

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Metcalfe, J.]

[Dec. 23, 1909.

*ISBISTER v. DOMINION FISH CO.*

*Negligence—Fire on vessel—Absence of precautions against fire spreading—Dangerous conditions—Failure to warn passengers to escape.*

In the absence of direct evidence as to the cause of a fire which destroyed the defendants' steamer while lying at her dock, and in consequence of which the plaintiff suffered severe personal injury and loss, proof of the existence of dangerous conditions in the furnace room, where it was probable the fire had started, of the absence of means to put out an incipient fire, that when the fire was first noticed it had gained such headway that the plaintiff could only escape by jumping into the lake, and that there was either no watchman on duty or, if on duty, he neglected to give any warning to the passengers to escape, so that some of them were burned to death in their rooms, is sufficient to warrant a finding of negligence on the part of the defendants and a verdict for the plaintiff for substantial damages.

*Hagel*, K.C., and *Blackwood*, for plaintiff. *Heap and Stratton*, for defendants.

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Metcalfe, J.]

*SCHWEIGER v. VINEBERG.*

[Dec. 23, 1909.

*Sale of goods—Rejection—Retention of bill of lading.*

When the buyer of goods exercises his right, under s. 30 of the Sale of Goods Act, R.S.M. 1902, c. 152, to reject the goods because the seller delivered a quantity larger than that contracted for and also delivered goods contracted for mixed with goods of a different description not included in the contract, the retention by the buyer of the bill of lading creates no liability on his part.

*Phillips and Chandler*, for plaintiff. *Hoskin*, K.C., and *Montague*, for defendant.

## Province of British Columbia.

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### SUPREME COURT.

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Clement, J.]

**TIMMS v. TIMMS.**

[Dec. 28, 1909.

*Divorce—Petition by wife—Omission to aver non-collusion—No appearance by respondent—Service of notice of subsequent proceedings.*

In the affidavit filed by the petitioner for a judicial separation it was not alleged that there was no collusion or connivance between the parties.

*Held*, 1. That such allegation is a positive statutory requirement preliminary to the issue of a citation.

2. Where the respondent has been served with a citation and has not appeared, service of notice of subsequent proceedings in the cause is not necessary.

*Brydone Jack*, for petitioner. No one for respondent.

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### Book Reviews.

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*The law relating to public officers having executive authority in the United Kingdom.* By A. W. CHASTER, Barrister-at-law. London: Butterworth & Co., 11 and 12 Bell Yard, Temple Bar. 1909.

This is an enquiry into the limits of the authority of public officers in their executive capacity and their liability and the remedies for breach or excess of such authority.

In 1886 a digest of cases was published under the title of Executive Officers, and the present work, in an extended and elaborate form, claims to be a complete record of the common and statutory law on the subject. As might be supposed, it deals most exclusively with the law relating to such officers under the statute law of the United Kingdom, and it is only where such statutes are similar to ours that the authorities and the statement of law therein related thereto are of help in this country. These observations have special application to Parts I. and II. of the work. Part III. is more general in its character, and is an excellent summary of the authorities on the subject of the liability of public officers, (1) under warrants and orders of Supreme Court

at common law, (2) under warrants and orders other than those above mentioned, (3) under inherent powers. Then follow statements of the law on the subjects of remedies, protection, breach of duty, excess of powers, self-defence, etc., both as to civil and criminal proceedings.

Whilst this work may not be of much use to the majority of the profession in this country, it is one which should be in the library of every law association or other libraries which claim to be at all complete.

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### Flotsam and Jetsam.

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Judge Edward Pierce of Boston was much impressed with the rapidity with which the business of the English courts was transacted, in a recent visit abroad. He was also struck with the feeling of mutual respect between the judges and the lawyers. He says:—

“What impresses a stranger who is visiting the English courts is the thorough manner in which a judge goes into a case, and the complete mastery he has of the subject-matter in dispute, including all its minor details. The Chief Justice heard, and disposed of four separate murder cases in ten days, and yet each case was so carefully and completely heard that the rights of each of the defendants were carefully protected. In the English courts, technical and extraneous matters are eliminated, and court, counsel and jury get right down to the main facts, without unnecessary delay.”—*Green Bag*.

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“Dad,” said the youngest son of Mr. Briefer, K.C., “I want to ask you a question about law.” “Counsel’s opinion is at your service, my son,” smiled the genial Briefer. “Well, dad, supposing a man had a peacock and the peacock went into another man’s garden and laid an egg, who would the egg belong to?” Briefer was relieved; this was an easier one than usual. “The egg, my son, would belong to the man who owned the peacock,” he said, “but the man on whose garden it was laid would have good cause for an action for trespass.” “Thank you, dad.” Silence for a brief space, and then: “But, dad, can a peacock lay an egg?”

# Canada Law Journal.

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## *UNIFORMITY OF LAW IN CANADA.*

It has more than once been pointed out in this journal that there is a provision in the British North America Act which it is most desirable should be carried out, but which up to the present time has been virtually a dead letter. The section we refer to is s. 94, which reads as follows:—

“94. Notwithstanding anything in this Act, the Parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick, and of the procedure of all or any of the courts in those provinces; and from and after the passing of any Act in that behalf the power of the Parliament of Canada to make laws in relation to any matter comprised in any such Act, shall notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making provision for such uniformity shall not have effect in any province unless and until it is adapted and enacted as law by the legislature thereof.”

It will be observed that the section is confined to three of the provinces only. It ought to be extended to all, including Quebec.

Again, the rights of provinces are perhaps too much safeguarded by the concluding clause, which is a somewhat anomalous provision inserted no doubt in the supposed interest of the provinces. At any rate it is there, and after the proposed law has been made by the Parliament of Canada it will only take effect in those provinces which choose to adopt it. But having adopted it their legislative competence to deal with the matter will thenceforth cease.

If the Provincial Legislatures were to be guided by what is the best for the whole Dominion and were not led away by mere provincialism, it would be apparent to them, as to every unprejudiced person that there are some subjects of such general and

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universal interest that it would be in the highest degree beneficial that they should be dealt with and governed by one uniform law extending throughout the whole Dominion, even at the expense of a sacrifice of provincial legislative power over such subjects.

Whatever facilitates trade and commerce is beneficial to the whole community, and our great facility for trade and commerce would be the uniformity of commercial law throughout the Dominion. We have, fortunately, some branches of commercial law which are already uniform, for instance, the law relating to Banks and Banking, the law relating to Bills and Notes, the law relating to Shipping, the law relating to Railways, to a very large extent. No one in his senses would wish that the provinces should be at liberty to make different laws on these subjects. Everybody who is engaged in commerce has daily experience, though he may not realize it, of the benefit of there being one, and not a multiplicity of varying laws in the above subjects. But if it is beneficial to the whole Dominion that there is this uniformity law in the class of subjects above mentioned, it would be still more beneficial if the uniformity were extended to some other classes of subjects.

The Imperial Parliament has, with the benefit of the most varied experience, and with the assistance of the best legal talent the Empire can furnish, recently consolidated that very important branch of the law which relates to limited companies. If the Parliament of Canada, taking that as the model, were to frame an Act which could be adopted throughout the Dominion, it would be of inestimable benefit.

There are three other branches of law which the Imperial Parliament has codified, viz.: Partnership, Insurance and the Sale of Goods, which it would also be most desirable to have enacted as the uniform law of the Dominion.

There are two other subjects which might also be made the subject of Federal legislation with immense advantage to the working classes, and they are, Mechanics' Liens, and Workmen's Compensation for Injuries. Workmen going from one province

to another would be conscious that their rights would be everywhere governed by the same laws. Merchants in one province dealing with customers in another province would have the same confidence.

Unfortunately we do not appear to have at present in the Parliament of Canada any statesmen willing to devote his attention to this important subject, or to take any steps whatever to carry out the provisions of the British North America Act to which we have referred, and yet it is one which the fathers of federation evidently thought of importance, or the provision would not have been made.

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#### EASEMENTS AND LAW OF LIMITATIONS.

The case of *Mykel v. Doyle*, 45 U.C.R. 65, may be considered to have received another "black eye." It may be remembered that in that case it was decided by the majority of the Court of Queen's Bench (Hagarty, C.J., and Cameron, J.), affirming Patterson, J.A., that the ten years' limitation does not apply to actions to recover easements. Armour, J., dissented, pointing out that the definition of land in our Limitation Act (R.S.O. c. 133) includes incorporeal hereditaments, under which head an easement would come. The case was referred to in *Bell v. Golding*, 23 App. R. 485, and Burton, J.A., then said: "Without expressing any decided opinion I incline to the view that the dissenting judgment of Armour, C.J. (sic.), in *Mykel v. Doyle*, 45 U.C.R. 65, was correct." And now Meredith, C.J.C.P., has said in the recent case of *Ihde v. Starr*, 19 O.L.R., at p. 178, "if the matter were res integra I should be of the same opinion as Armour, J." After two such knocks, it would seem possible if the point were carried to an appellate court that a different conclusion might be arrived at. There is now an equal division of judicial opinion on the point in question represented by Patterson, J.A., Hagarty, C.J., and Cameron, J., on one side, and Armour, J., Burton, J.A., and Meredith, C.J.C.P., on the other.

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*GETTING MONEY OUT OF COURT.*

Many years ago, an official of the Court of Chancery in old Upper Canada, made his way into the strong room at Osgoode Hall and took therefrom a considerable sum of money in the custody of that venerable institution. In those days it was very easy to pay money into court, but much red tape had to be untied before it could be got out, and the difficulty in this regard became proverbial. One of the common law judges of that day, well known for his Irish humour, expressed in his own witty way his delight that success had at last crowned an effort to get money out of court. There appears to be a different way of doing things in Germany, for, if a newspaper is to be believed, the most recent practice there is for men who desire to get money out of court to obtain access to the court rooms late in the afternoon, put on the judicial caps and gowns, and thus deceiving the janitor, examine the court records, make a note of the names and addresses of persons having money in court, draw up the necessary documents for the collection of these debts, making free use of the court seal for that purpose. These quondam judges then transform themselves into bailiffs, and collect the moneys, for which court orders have been made. We confess that this proceeding sounds rather apochryphal, but there is a flavour of novelty about it which is refreshing, and the suggestion may be helpful in any difficult case that may arise as to getting money out of court.

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It seems somewhat odd to discuss the constitutional rights of citizens of the United States as to "liberty in the pursuit of happiness" in connection with lawyers, as such; especially when this happy liberty is attempted to be interfered with by a statute forbidding lawyers to solicit business. It gives a new view of the delights of "ambulance chasers." Doubtless the "liberty and pursuit of happiness" claimed by an attorney in Washington Territory, who was also a "solicitor," should not be rudely dealt with.

**REVIEW OF CURRENT ENGLISH CASES.**

(Registered in accordance with the Copyright Act.)

**WILL—DESTRUCTION—INTENTION—WILL FOUND TORN IN PIECES  
—EXECUTORS ACCORDING TO TENOR—UNIVERSAL LEGATEES IN  
TRUST—FORM OF GRANT.**

*In re MacKenzie* (1909) P. 305. This was an application for probate of a will. The testatrix had executed the will in due form, whereby she left all she possessed to two persons, Pennycock and Lane, in trust to pay the income to the testatrix's husband for life, and after his death divide the estate between the four children. She had frequently referred to the will in her lifetime as an existing will, and had stated where it would be found on her death, and had never expressed any intention of destroying it. On her death the will was found sealed up in a linen bag, but it was all torn to pieces, which, when put together, formed the complete will. Deane, J., held that there had been no revocation of the will, and that notwithstanding it had been torn to pieces it was valid, but he held the two legatees in trust, not being directed to pay debts, could not be deemed executors according to the tenor, but that as universal legatees they had a paramount right to the husband, and administration with the will annexed was granted to the trustees.

**EASEMENT—RIGHT OF WAY—PRESUMPTION OF LOST GRANT.**

*Hulbert v. Dale* (1909) 2 Ch. 570. This was an action to restrain the defendant from using a certain road over the plaintiff's premises and over which the defendant claimed a right of way. By an inclosure award made in 1904 certain common lands were allotted to three adjoining owners, including the predecessors in title of the plaintiffs, and the defendant's lessor, and a private carriage road was awarded to the same persons leading from a specified point to the defendant's farm. This awarded road was never in fact used, and part of the plaintiff's buildings had stood for many years on part of the site of it. It was shewn by the evidence that as far as living memory went, up to the time of the dispute between the plaintiff and defendant, the road in question had been used by the defendant and his predecessors in title or occupation, and that it ran parallel with the road awarded. There had been unity of possession however of the plaintiff's and defendant's farms from 1889 to 1905, so that no

title could have been acquired by possession. In these circumstances Joyce, J., was of the opinion that, on the evidence, a lost grant of a right of way over the road in question ought to be presumed, and he dismissed the action; and his decision was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.J.J.).

HIGHWAY — DEDICATION — PRESUMPTION—DISUSED TRAMWAY —  
RAILWAY COMPANY — CAPACITY TO DEDICATE HIGHWAY —  
COSTS.

*Coats v. Herefordshire* (1909) 2 Ch. 579 may be briefly noticed for the fact that the Court of Appeal (of whom the court was composed is not stated) have affirmed the judgment of Eve, J., that a railway company, being owners of a disused strip of land alongside a highway, may by non-user themselves, and by suffering the public to use it as part of the highway, effectually dedicate such strip as a highway. The plaintiffs, however, having succeeded as to part of the land in question, were ordered to pay only five-sixths of the costs.

LANDLORD AND TENANT—LEASE AT RACK RENT—COVENANT BY  
LESSOR TO PAY TAXES—SUB-LEASE AT A PROFIT—INCREASE OF  
TAXES CONSEQUENT ON SUB-LEASE—LIABILITY OF LESSOR.

*Salaman v. Holford* (1909) 2 Ch. 602. In this case the Court of Appeal (Cozens-Hardy, M.R., Moulton and Farwell, L.J.J.) have affirmed the decision of Neville, J. (1909) 2 Ch. 64 (noted ante, vol. 45, p. 596). The facts, it may be remembered, being, that the plaintiff had let to one Singer certain premises at a rack rent, and had covenanted with Singer to pay all rates and taxes then or thereafter payable in respect of the premises. Singer, with the plaintiff's consent, sub-let the premises at a profit, and in consequence thereof the rates and taxes were increased, and the question was whether the plaintiff was liable for such increased taxes. Neville, J., held that he was, and the Court of Appeal now say that he was right.

BREWERY COMPANY—MORTGAGE TO SECURE DEBENTURES—MORT-  
GAGE OF LICENSED PREMISES—REFUSAL OF LICENSE—COM-  
PENSATION MONEY.

*In re Bentley's Yorkshire Breweries* (1909) 2 Ch. 609. A summary application was made to the court on behalf of trustees

to determine the following question. The applicants were trustees of a mortgage of licensed premises as security for debenture holders; the mortgage provided that on the application of the mortgagors the trustees were to concur in a sale of any of the mortgaged premises and hold the proceeds in trust for re-investment. Licenses were refused in respect of part of the mortgaged premises and compensation was paid to the trustees in respect of such refusal. The question was whether such moneys were to be treated as proceeds of a sale of part of the mortgaged premises, and subject to the trust for reinvestment, and Warrington, J., held that they were, and that if the trustees had the requisite powers they might invest such moneys in the purchase, or on mortgage, of licensed premises, and, if so advised, in the purchase or on mortgage of other licensed premises owned by the mortgagors.

INFANT—MAINTENANCE—INFANT TENANT IN TAIL—ORDER SANC-TIONING MORTGAGE OF REAL ESTATE—REMAINDERMEN NOT PARTIES—DISENTAILING DEED BY WAY OF MORTGAGE—JURIS-DICTION—TRUSTEE ACT, 1893 (56-57 VICT. c. 53), ss. 30, 33—(R.S.O. c. 336, ss. 11, 14).

*In re Hamborough, Hamborough v. Hamborough* (1909) 2 Ch. 620 is characterized by Warrington, J., as “a somewhat extraordinary case.” It arises out of the circumstance that the English court, though it has jurisdiction to order the sale or mortgage of an infant’s real estate, to which he is entitled in possession, to provide for payment of past maintenance, has no jurisdiction to make such order to provide for future maintenance. And as regards estates, to which an infant is entitled in remainder, it has no jurisdiction to make any order for sale or mortgage even for past maintenance. Romer, J., in apparent forgetfulness of this distinction, on an application in Chambers, made an order authorizing the mortgage of the estate of an infant tenant in tail in remainder to raise money for his future maintenance, and by a subsequent order assuming to act under the Trustee Act, 1893, ss. 30, 33 (R.S.O. c. 336, ss. 11, 14), he declared the infant a trustee of the estate and ordered certain persons to execute the mortgage on his behalf, which included a disentailing deed, which was duly enrolled for the purpose of barring the entail. This was an action at the suit of the person entitled in remainder expectant on the infant’s estate tail to have it declared that this mortgage was null and void, and that the estate re-

mained subject to the limitations of the settlement under which the infant was entitled; and Neville, J., so declared. It may be noted that the mortgage had been paid off, so that no question arose as to the mortgagees' rights. It may also be noted that although Neville, J., mentions the point as to whether the mortgage being paid off the estate tail revested, but it was not necessary for him to adjudicate upon it. In Ontario it may be taken to be settled that a mortgage is as effectual as an absolute conveyance to bar an entail, and that, on payment and discharge of the mortgage, the entail does not revive: *Lawlor v. Lawlor*, 10 S.C.R. 194.

STREET RAILWAY—COMMON CARRIER OF PASSENGERS—MUNICIPALLY OWNED STREET RAILWAY—NEGLIGENCE—LIABILITY FOR PERSONAL INJURIES—CONDITION LIMITING LIABILITY.

In *Clarke v. West Ham* (1909) 2 K.B. 858 the plaintiff claimed to recover from the defendants, a municipal corporation, damages for injuries sustained by the plaintiff while travelling on a street railway owned and operated by the defendants. The defendants had endeavoured to limit their liability to the sum of £25, by posting a notice in their cars, stating, as the fact was, that they carried passengers at a less rate than that allowed by law, upon the condition that the maximum sum for which they were liable to any passenger for any injury suffered on the car was £25. But the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.J.J.) affirmed the judgment of Coleridge, J., that that notice did not relieve the defendants from their common law liability as common carriers, and that the defendants were not entitled to limit their liability for negligence without giving the passenger the option of travelling at the higher fare without any such condition. If, on such an offer being made, a passenger elected to be carried at the lower rate the court considered that he would be bound by the condition.

LANDLORD AND TENANT — FORFEITURE OF LEASE — BREACH OF COVENANT—EJECTMENT—ELECTION TO DETERMINE LEASE—APPLICATION BY UNDER LESSEE FOR RELIEF AGAINST FORFEITURE OF HEAD LEASE—EFFECT OF ORDER RELIEVING AGAINST FORFEITURE—CONVEYANCING AND PROPERTY ACT, 1881 (44-45 VICT. c. 41) s. 14—(R.S.O. c. 170, s. 13).

*Dendy v. Evans* (1909) 2 K.B. 894. In this case a lease was made of certain premises containing a covenant by the lessee to

repair, with a proviso for re-entry in case of breach. The lessee made an under lease of the premises to the defendant, who gave a covenant to repair with a similar proviso for re-entry. The premises became out of repair and the head lessor issued a writ against the lessee to recover possession. The lessee then assigned the under lease and the benefit of all arrears of rent due thereunder to the plaintiff in the present action, who without being made a party to the ejectment action, applied to the court under the Conveyancing and Property Act, 1881, s. 14 (R.S.O. c. 170, s. 13), for relief against the forfeiture, on which application an order was made that all further proceedings in the ejectment action be stayed, that the applicant be relieved from any forfeiture of the lease, and that she should hold the demised premises according to the said lease without any new lease. The plaintiff, now as assignee of the lease under which defendants held, claimed to recover the arrears of rent due by them. The defendants contended that the order relieving against the forfeiture was bad, because the plaintiff was no party to the action in which it was made, and that the effect of the order was not to revive the under lease, which had been forfeited by the issue of the writ of ejectment. But Darling, J., held that the order had been properly made, and had the effect of restoring the lease and under lease, and the plaintiff as assignee of the latter was entitled to recover.

PRACTICE—EQUITABLE EXECUTION—RECEIVER—PATENT OF INVENTION—JUDICATURE ACT, 1873 (36-37 VICT. C. 66) S. 25(8)—(R.S.O. C. 51, S. 58(9)).

*Edwards v. Picard* (1909) 2 K.B. 903. We have come to look upon a patent of invention as being, at all events in some cases, a valuable right of property, but when a judgment creditor seeks to make such a right of his debtor available in execution, he will find considerable difficulty in doing so. In the present case the plaintiff, who had recovered judgment in the action against the defendant for a sum of money, applied for the appointment of a receiver of all rents, profits and moneys receivable in respect of the defendant's interest as the owner of patents of certain inventions. It was not shewn that he was in receipt of any profits therefrom, either by way of royalties or otherwise. Sutton, J., refused the application, and the Court of Appeal (Williams, Moulton and Buckley, L.J.J.) affirmed his decision, holding that the court has no power under the Judicature Acts

to appoint a receiver in a case where, prior to those Acts, no court had power to grant such relief. Prior to the Judicature Acts the court holds such rights could not be made available in execution, neither can they now, because a patent of invention is a mere chose in action and entirely distinct from the right of property in a chattel created under it, and a chose in action is not exigible, except in the case of debts which are expressly made liable to attachment. As Williams, L.J., points out, a patent merely confers a right to prevent others from manufacturing. In Ontario the Provincial Legislature has anticipated the difficulty shewn to exist at law in the way of realizing on such rights of property, and has expressly made patent rights saleable in execution by the sheriff: 9 Edw. VII. c. 47, s. 16.

SHIP—CHARTER-PARTY—“READY FOR LOADING”—DISCHARGE OF PREVIOUS CARGO—CANCELLATION OF CHARTER-PARTY.

*Lyderhorn v. Duncan* (1909) 2 K.B. 929 is a case in which the construction of a charter-party was in question. The charter-party, dated November 15, 1907, provided that the plaintiff's vessel “Sydenham” should proceed to Iquique and Caleta Buena, and there receive a full cargo of nitrate of soda. Twenty-five lay days were to be allowed the charterers for loading the ship and for awaiting orders from abroad. The lay days were to be reckoned from the day after the master should give notice to the charterers' agents that he was ready to receive the cargo, and not to commence before January, 1908, at the respective ports and to cease when he should give the master notice that he was at liberty to proceed to sea. It also provided that stiffening of nitrate should be supplied by the charterers at Iquique as required, but not before Dec. 10, on receipt of 48 hours' notice from the master of his readiness to receive the same. Should the vessel not have arrived at the loading port and be ready for loading, in accordance with the charter, on or before January 31, 1908, the charterers were to have the option of cancelling the charter. At the date of the charter-party the vessel was discharging a cargo of coal at Caleta Buena, and it was intended to complete her discharge at Iquique. She arrived at Iquique on December 13, and by January 27, 1908, had discharged as much of her cargo of coal as could safely be unladen without some stiffening. The master therefore gave notice to the charterers' agents that he required 700 tons of nitrate for stiffening, but they refused to supply it unless he would agree to re-deliver it if the

charter-party were cancelled. It was admitted that the whole of the cargo of coal could not, even if the stiffening had been supplied, have been discharged by January 31, 1909, the time limited for her to be ready to receive the cargo under the charter-party. The defendants, the charterers, on that day cancelled the charter-party, and the question was whether they were entitled so to do. Lord Alverstone, C.J., who tried the action, decided that they were and dismissed the action with costs; and the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.J.J.) affirmed his decision; their lordships holding that the provision for the supply of stiffening, i.e., ballast, for keeping the vessel upright, did not exonerate the owners from having the vessel ready to receive the charterers' cargo on 31 January, and that it could not be said to be ready so long as any other cargo was on board.

ARBITRATION — ARBITRATOR — QUALIFICATION — ARBITRATOR NOT  
QUALIFIED—PARTY ACTING IN ARBITRATION PROCEEDINGS—  
IGNORANCE OF DISQUALIFICATION OF ARBITRATOR—ESTOPPEL.

In *Jungheim v. Foukelmann* (1909) 2 K.B. 948 the plaintiffs brought the action to have it declared that an award made on an arbitration between the plaintiffs and defendant was null and void. The plaintiffs had purchased a quantity of wheat from the defendant subject to a condition that any dispute arising out of the contract should be referred to arbitrators, one to be appointed by each of the parties, and the two arbitrators having power to appoint a third, and it was further provided that the arbitrators should all be principals engaged in the corn trade as merchants, millers, factors or brokers, and also members of one or other of certain specified associations. The contract also provided for an appeal to a committee of appeal elected for the purpose. A dispute having arisen, a resort was had to arbitration, and the parties attended the arbitration, and an award was made in favour of the defendant which was afterwards confirmed by the committee of appeal. Neither of the arbitrators appointed by the parties was in fact a member of any one of the specified associations, but this fact was not known to the plaintiffs until after the award had been confirmed in appeal. The two arbitrators had acted as arbitrators on many occasions under similar contracts containing a similar arbitration clause, and were familiar with the corn trade. In these circumstances the plaintiffs contended that the award was made by persons not

qualified to act as arbitrators under the contract, and their award therefore was null and void, and Pickford, J., who tried the action, gave effect to that contention, holding that, having acted in ignorance of the disqualification, the plaintiffs were in nowise estopped from taking the objection, for although the plaintiffs might be estopped from taking the objection that the arbitrator appointed by themselves was disqualified, yet that could not affect their right to object to the disqualification of the defendants' arbitrator when they became aware of it.

DEFAMATION—PAPER PUBLISHED BY PARLIAMENT—PRINTING EXTRACTS FROM PARLIAMENTARY PAPER—3-4 VICT. C. 9, S. 3—(9 EDW. VII. C. 40, S. 10)—RULE 461—(ONT. RULE 488).

*Mangena v. Wright* (1909) 2 K.B. 958. The plaintiff had lived in South Africa, and while there had interested himself in exciting some of the negroes to acts of rebellion. A report had been made to the Imperial Government, and the report had been printed and published in an official blue book. A reader of the London *Times*, a Natal official, seeing by a report in the paper that the plaintiff had been petitioning the King, drew attention in a letter to the *Times* to the official report, of which he sent a copy, which was published in the *Times*. The report contained severe reflections on the conduct of the plaintiff, who was stated to have acted in a reprehensible manner. The action was brought against the printer and publisher of the newspaper to recover damages for the alleged libel. The point was raised on the pleadings that under the Act of 3-4 Vict. c. 9, s. 3, the publication was protected. This question of law, and also the point whether evidence taken in a former trial in which the plaintiff had sued to recover damages for a prior alleged libel imputing similar conduct to the plaintiff; and also the point whether evidence as to the plaintiff's bad character would be admissible in mitigation of damages, were ordered to be argued, and Phillimore, J., held that if the publication in question was made in good faith, it was protected by the Act referred to. Also, that the evidence taken in the former action was admissible, saving all just exceptions; and also, that evidence of plaintiff's bad character would be admissible in mitigation of damages, and that Rule 461 (Ont. Rule 488) has not changed the law as laid down in *Scott v. Sampson* (1882) 8 Q.B.D. 491, on this point.

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CRIMINAL LAW—FALSIFICATION OF ACCOUNTS—MACHINE—TAXI-METER—FALSIFICATION OF ACCOUNTS ACT, 1875 (39-40 VICT. c. 24) s. 1—(CR. CODE, s. 415).

*The King v. Solomons* (1909) 2 K.B. 980 serves to shew that as the improvements effected by modern inventions come into operation, old forms of offence assume new aspects. In the present case the defendant was the servant of the plaintiffs, and had been entrusted with a taximeter cab furnished with an automatic register for recording the distance travelled, and the amount earned by the driver. From the figures appearing on the dial at the end of the day the amount payable to the defendant was ascertained. For several days the defendant took certain persons as passengers to certain places, and wilfully and with intent to defraud the plaintiffs, left the lever of the machine raised so that it recorded nothing, and collected fares for such trips, for which he did not account. The returns made by him to the plaintiffs were consequently false. The defendant was convicted with falsifying an account within the meaning of 39-40 Vict. c. 24, s. 1 (see Cr. Code, s. 415), and the Divisional Court (Lord Alverstone, C.J., and Darling and Jelf, J.J.) held that he had been properly convicted.

SHIP—CONTRACT OF CARRIAGE—PASSENGER'S LUGGAGE—THEFT BY SHIOPWNERS' SERVANTS—CONDITION EXEMPTING CARRIERS FROM LIABILITY FOR "LOSS BY WHATSOEVER CAUSE OR IN WHATEVER MANNER OCCASIONED."

In *Marriott v. Yeoward* (1909) 2 K.B. 987 the plaintiff accepted a ticket entitling her to be carried with her luggage on the defendants' ships to a certain place. The ticket contained a condition that the defendants were not to be liable for any loss sustained by the plaintiff "by whatsoever cause or in whatever manner occasioned." This was printed in brevier type. The plaintiff denied that she noticed it, or knew of its existence. On the passage some of her luggage was stolen from trunks entrusted by the plaintiff to the defendants' servants to be placed in the hold, and which trunks were locked, and were opened while in the defendants' sole control. The plaintiff claimed she was not in any case bound by the condition, but that even if defendants were entitled to rely on it, it did not cover losses due to the fraudulent acts of their own servants. Pickford, J., who tried the action, came to the conclusion that the plaintiff was bound by the condition, and that it was sufficiently broad in its terms to cover the loss in question. The action therefore failed.

**SHIP—CHARTER-PARTY—DEMURRAGE—LIEN.**

*Rederiactieselskabet "Superior" v. Dewar* (1909) 2 K.B. 998. In this case the plaintiffs were the owners of a ship which had been chartered to the defendants. The charter-party provided that the charterers should be allowed 35 running days for loading and discharge, to be effected according to the custom of the port. Lay days to commence the day after the master has given written notice that his vessel is discharged and ready to receive or discharge cargo. In the event of detention of the vessel by the charterers beyond the laying days, demurrage at a specified rate was to be paid by them "day by day as falling due," and the owners were to have a lien for all "freight, demurrage and all other charges whatever." This action was brought by the shipowners against an indorsee of the bill of lading which incorporated the provisions of the charter-party, to determine the amount of the plaintiffs' lien. Bray, J., who tried the action held that the lien included demurrage at the port of loading, notwithstanding it was made payable "day by day as falling due." He also held that "charges" did not include dead freight, but that it was not necessarily confined to charges specifically mentioned in the charter-party, but included certain expenses incurred by the ship's agents at Buenos Ayres at the request of the charterers' agents. The Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.J.J.) held that the lien for "charges" could not extend as against the defendant, the indorsee of the bill of lading, to any charges not contemplated by the charter-party, and to this extent varied his judgment, which in all other respects was affirmed.

**BANK—CHEQUE—CHEQUE DRAWN BY DIRECTORS ON BEHALF OF COMPANY—FORGERY—NEGLIGENCE—PASS BOOK RETURNED WITHOUT OBJECTION—SETTLED ACCOUNT.**

*Kepitigalla Rubber Estates v. National Bank of India* (1909) 2 K.B. 1010. In this case the plaintiffs had a banking account with the defendants, and the plaintiffs when opening the account gave the defendants written authority to honour cheques drawn by two directors of the plaintiff company and its secretary. The secretary fraudulently issued cheques purporting to be signed by two directors, but really forged by him, and had got them cashed by the defendants and had misappropriated the proceeds. After these cheques had been paid by the defendants, the pass book had been from time to time taken out by the plaintiffs and

returned by them to the defendants without any objection being made; and the defendants contended that this amounted to a settled account. One of the names had been forged by means of a rubber stamp, which the secretary had got hold of, but not owing to any want of reasonable care on the part of the director whose name it bore. Bray, J., who tried the action, held that the plaintiffs were entitled to recover, and were not estopped by their omission to make objection when returning the pass book shewing the payments of the forged cheques. The forgeries extended over a period of two months, during which time neither the bank pass book nor the cash book of the company were examined by the directors, but this was held not to be such negligence as relieved the defendants from liability.

**ATTACHMENT OF DEBT—GARNISHEE ORDER—RETIRED PAY OF  
OFFICER IN THE ARMY—PENSION DUE BUT NOT PAID—BANK  
CREDITING AMOUNT TO CUSTOMER—ARMY ACT, 1881 (44-45  
VICT. c. 58), s. 141.**

In *Jones v. Coventry* (1909) 2 K.B. 1029 judgment was recovered against the defendant for a sum of money. He was a retired army officer and as such was entitled to retired pay in respect of past services, this was payable quarterly, and on each occasion a form of warrant had to be filled up and signed by the defendant, before payment, which contained a declaration that he was entitled to retired pay for the last quarter, and a receipt for the amount. The warrant stated that it might be presented through a banker and might be negotiated in the country or abroad, and was to be left by the banker at the Paymaster-General's office one day for examination. The defendant opened an account at a bank for the sole purpose of collecting his retired pay, no other moneys being paid into the account, and he drew against the account by cheques in the ordinary way. On January 1, 1909, a sum of £6 13s. 8d. was standing to the credit of the account, and on that day defendant handed the bank a warrant for the quarter's pay, due that day, for collection; and the bank at once credited him with the amount, £17 12s. 6d. On the same day, after this amount had been credited, the bank was served with a garnishee order. The warrant was paid by the Paymaster-General on January 7. The defendant contended that both sums were protected by the Army Act, 1881 (44-45 Vict. c. 58), s. 141. The Master, on an application to pay over, held that the whole amount standing to the credit of the bank account was liable to

attachment, and he ordered it to be paid to the plaintiffs; but the Divisional Court (Darling and Jelf, JJ.) held that although the £6 13s. 8d. had lost its character of retired pay, as it had been actually received from the Paymaster-General at the time when the attaching order was served, and was therefore liable to attachment; yet the £17 12s. 6d. was not so liable, notwithstanding that the amount had been placed by the bank to the defendant's credit, as it retained the character of retired pay until it was actually paid by the Paymaster-General. The order of the Master was varied accordingly.

**MASTER AND SERVANT—BREACH OF CONTRACT—WRONGFUL DISMISSAL—MEASURE OF DAMAGES.**

*Addis v. Gramophone Co.* (1909) A.C. 488 was an action by a servant for wrongful dismissal, and the only question on the appeal was as to the proper measure of damages, and it was held by the House of Lords (Lord Loreburn, L.C., and Lords James, Gorrell and Shaw—Lord Collins dissenting), reversing the Court of Appeal, that damages in such a case cannot include any compensation for injured feelings, or for the loss the servant may sustain from the fact that the dismissal has made it difficult for him to obtain fresh employment.

**TRADE UNION—INDUCING DISMISSAL BY THREAT OF STRIKE—“TRADE DISPUTE”—“CONTEMPLATION OR FURTHERANCE OF A TRADE DISPUTE”—TRADE DISPUTES ACT, 1906 (6 EDW. VII. C. 47), S. 3, S. 5(3)—(R.S.C. C. 125, S. 32).**

*Conway v. Wade* (1909) A.C. 506, in which the plaintiff sues as a pauper, has reached the House of Lords. The case involved a very important question. The Court of Appeal having decided that where a workman was in default to a trade union for non-payment of a fine of 10s., and a district delegate of the union went to the defaulter's employers and threatened unless he were dismissed the rest of the employees would go on strike, and he was in consequence dismissed; that this is an act done in “furtherance of a trade dispute,” and is therefore made not actionable by the Trades Disputes Act, 1906 (1908), 2 K.B. 844 (noted vol. 45, p. 72). The House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, James, Atkinson, Gorrell and Shaw) have, happily for the interests of workingmen, seen their way to relieve them from the tyranny with which they were threatened, and have unanimously reversed the decision of the Court of

Appeal. The jury who tried the case found as a fact, that there was no trade dispute; but the Court of Appeal undertook to reverse this finding and, as their Lordships find, without sufficient grounds. There being in fact no trade dispute it followed as a matter of course that the matter was unaffected by the Act.

**ACTION FOR MALICIOUS PROSECUTION—WANT OF REASONABLE AND PROBABLE CAUSE—ONUS PROBANDI.**

*Corea v. Peiris* (1909) A.C. 549 was an appeal from Ceylon. The action was for malicious prosecution. The only evidence given by the plaintiff was that the charge had been made and failed. The Colonial Court of Appeal had set aside a judgment for the plaintiff, on the ground that the onus probandi of shewing malice, or want of reasonable and probable cause, was on the plaintiff and had not been discharged, and the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson and Collins and Sir A. Wilson) affirmed the decision.

**WILL—CONSTRUCTION—DIRECTION TO ACCUMULATE DURING MINORITY—GIFT TO CHILDREN OF EQUAL SHARES IN RESIDUE.**

*Fulford v. Hardy* (1909) A.C. 570 was an appeal from the Ontario Court of Appeal on the question of construction of the will of the late Senator Fulford whereby he gave to each of his children an equal share of the income of the whole of his residuary estate, subject to the provision "that until each child attains the age of twenty-five years what would have been his or her share is to accumulate and form part of my general estate." The Judicial Committee of the Privy Council (Lords Macnaghten, Dunedin and Collins and Sir A. Wilson) agreed with the court below, that during the conventional minority of the children, the accumulations of each share were to go to increase the residuary estate, of which each child was entitled to a share on attaining twenty-five, and not for the exclusive benefit of the respective shares.

**VENDOR AND PURCHASER—DEPOSIT—FORFEITURE OF DEPOSIT—DEFAULT BY PURCHASER.**

*Sprague v. Booth* (1909) A.C. 576 was an appeal from the Court of Appeal of Ontario affirming a judgment of Mabee, J. The action was brought to recover a deposit of purchase money which had been made in the following circumstances. The plain-

tiff's assignor had contracted with the defendant for the purchase of the defendant's stock in a certain railway for \$10,000,000, and on receipt of that sum the defendant was to transfer his stock. The agreement also provided that bonds were to be issued by the company to the amount of \$11,000,000, part of which the vendor, as a creditor of the company, was beneficially entitled to, and which he agreed to transfer to the purchaser on payment of the purchase money. The purchaser undertook to have the bonds prepared for execution by the company. \$250,000 was paid down by the purchaser as a deposit, which it was agreed was to be forfeited as liquidated damages in case he made default. The purchaser, or his assigns, never delivered the bonds for execution by the company, and made default in payment of his purchase money. Whereupon the defendant claimed that the deposit was forfeited, and the subject-matter of the contract was subsequently sold to other persons. The plaintiff claimed that both parties had made default, because the bonds had not been delivered as stipulated for, and therefore that he was entitled to recover back the deposit, but the Judicial Committee of the Privy Council (Lords Macnaghten, Dunedin and Collins, and Sir A. Wilson) were of the opinion that the plaintiff, or those through whom he claimed, were responsible for the non-delivery of the bonds, and therefore were not able to rely on their non-delivery as an excuse for their not carrying out the contract, and therefore that the action failed and was rightly dismissed.

**EXCHEQUER COURT OF CANADA—JURISDICTION—ADMIRALTY—  
ACTION TO ENFORCE MORTGAGE OF SHIP—COUNTERCLAIM FOR  
BREACH OF CONTRACT.**

*Bow v. The Camosun* (1909) A.C. 597, was an action in rem commenced in the Exchequer Court in British Columbia to enforce payment of a mortgage on a ship, which though given in respect of the price, was expressed to be made in consideration of money lent. The defendants set up by way of equitable defence pro tanto, a claim for damages for breach of the contract for building the ship. The local judge in British Columbia held that the Exchequer Court had jurisdiction to deal with such a claim, and his decision was affirmed by Burbidge, J., and subsequently by the Supreme Court of Canada. The Judicial Committee of the Privy Council (Lords Loreburn, L.C., and Lords Ashbourne, James, Gorrel and Shaw), however, came to the conclusion that the Exchequer Court has no jurisdiction to entertain

the claim set up by the defendants and ordered it to be struck out. Their Lordships holding that the Exchequer Court has no common law jurisdiction, and its statutory jurisdiction under Imperial Statute, 53-54 Vict. c. 27, and Dominion Act, 54-55 Vict. c. 29, is no wider than that of the Admiralty Division of the English High Court, and the defendants' remedy was therefore by cross-action in a court having jurisdiction to entertain the claim.

#### CONSTRUCTION OF WILL—RES JUDICATA.

*Badar Bee v. Noordin* (1909) A.C. 615 was an appeal from the Supreme Court of the Straits Settlements. The appellant had petitioned for a declaration that the devise and gifts contained in the 6th clause of the will in question were void and that the lands comprised therein and the income thereof belonged to the testator's next of kin. It appeared that in 1872 the court in a suit relating to the same will had declared the said gifts to be void and that they "fell into the undevised residue of the testator's estate," and that thereafter the gifts which were of annual sums were paid to the testator's next of kin with the assent of all parties interested, and that in 1891 in another suit relating to the same clause the court had declared that the defendants, who included the trustees of the will, were estopped from contending that the said annual sums were not wholly undisposed of. Notwithstanding this state of facts the Colonial Court had held that the prior judgments of the court did not relate to the corpus of the property comprised in clause 6, but only to the income, and that the corpus, subject to the payment of certain annual sums, fell into the residue disposed of. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson and Collins, and Sir A. Scoble), however, reversed this decision, and held that the prior decision had dealt with the matter and applied both to the income and corpus, and therefore that the matter was res judicata and could not be reopened.

#### CANADA RAILWAY ACT, 1903, s. 168—SUPREME AND EXCHEQUER COURTS ACT (R.S.C. 1886, c. 135), s. 26—APPEAL TO HIGH COURT—FURTHER APPEAL TO SUPREME COURT INCOMPETENT.

In *James Bay Railway v. Armstrong* (1909) A.C. 624 the Judicial Committee of the Privy Council (Lords Macnaghten, Dunedin and Collins and Sir A. Wilson) have determined that

under the Canadian Railway Act, 1903, c. 168 (see now R.S.C. c. 37, s. 209), an appeal from an award fixing compensation for land expropriated under the Act, lies either to the High Court, or the Court of Appeal; but if it is taken to the High Court no further appeal lies to the Supreme Court, whereas if the appeal is taken to the Court of Appeal an appeal will lie from that court to the Supreme Court. In this case the appeal was had to the High Court and a further appeal was then taken to the Supreme Court, which that court rejected as incompetent. The appellants appealed from that decision and also, by special leave, appealed from the decision of the High Court, both of which appeals were dismissed.

NEGLIGENCE—DEFECT IN GAS APPARATUS—INJURY TO THIRD PARTIES—LIABILITY OF CONTRACTOR TO THIRD PARTIES—DANGEROUS ARTICLE.

*Dominion Natural Gas Co. v. Collins* (1909) A.C. 640 was an appeal from the Court of Appeal for Ontario and deals with a very important point. The facts were simple, the defendant gas company supplied natural gas to a railway company and for the purpose of such supply installed the necessary apparatus, which included apparatus for the regulation of pressure, and a valve for the escape of the gas where it exceeded the desired pressure. This apparatus was installed in the machine shop of the railway company in which a boiler was placed which was heated by gas jets. The escape pipe opened directly into the boiler house, an escape of gas took place and it was ignited by the gas jets of the boiler, and this caused an explosion whereby one of the railway employees was killed, and another injured. The representatives of the deceased workman, and the injured workman, both brought actions against the railway company and the gas company. There was evidence that the workmen of the railway company had tampered with the gas plant and interfered with its working properly, and the jury found that the railway company had been negligent in permitting their men to tamper with the gas plant. The jury also found that the apparatus was negligently constructed, on the ground that the escape pipe ought to have been led to the open air. The actions were dismissed as against the railway company, but judgment was given against the gas company at the trial, which was affirmed by the Court of Appeal. On the appeal to the Judicial Committee of the Privy Council

(Lords Macnaghten, Dunedin and Collins, and Sir A. Wilson) it was urged on behalf of the gas company that they were not liable, because the gas plant had been furnished and installed under the direction and to the satisfaction of the railway company's engineer, and the gas company was bound to install whatever the company directed, and the apparatus had been accepted by the railway company with full knowledge of the alleged defect. Their Lordships in affirming the judgment against the gas company, came to the conclusion that the finding of the jury, that the escape of gas took place at the valve and that the gas company were guilty of negligence in not carrying the escape pipe to the open air, was well warranted by the evidence, and that the rule that where a person furnishes a dangerous article which may cause injury to a third person, he is bound to take reasonable care that the article is properly constructed, applied.

### Correspondence.

*Editor CANADA LAW JOURNAL:*

SIR,—You quote, with apparent approval, in the C.L.J. of Nov. 15, p. 701, certain observations of Mr. B. E. Walker, president of the Canadian Bank of Commerce, respecting succession duties. Mr. Walker says the government may safely tax income and spend the money, but that, when a man dies and his wealth is being divided among his heirs, who will do what they please with it, it will reduce the nation's productive capital for the government to take a portion and spend it on the current expenses of governing the country. It ought to be evident that the way to reduce the productive capital of a country is for government and people to spend more on current expenses, non-productive, than the country's income. Nothing else, unless it be the exhaustion of natural resources, will reduce a nation's productive capital. If a man dies and leaves ten million dollars in bonds, bank stocks, and shares in industrial corporations, and the government takes one million dollars in succession duties, not a bond will be cancelled, and not a bank or industrial corporation will find its capital reduced by the value of a single share.

Yours,

X. X.

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REPORTS AND NOTES OF CASES.

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**Dominion of Canada.****SUPREME COURT.**

B.C.]                    **TRAVES v. FORREST.**                    [Oct. 20, 1909.

*Mining agreement—Interest in ore to be mined—Registration  
—Construction of statute.*

An agreement by which the owner or lessee of a mine authorizes another to work it and receive a share of the proceeds, is not an instrument requiring registration under the provisions of the British Columbia Bills of Sale Act, 5 Edw. VII. c. 8. Judgment appealed from (14 B.C. Rep. 183) affirmed.

Appeal dismissed with costs.

*Robert Wetmore Hanington, for appellant. S. S. Taylor,  
K.C., for respondent.*

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Que.]                    **BARTHE v. HUARD.**                    [Nov. 18, 1909.

*Evidence—Privilege—Notary—Jury trial—Objections to charge  
—Objections after verdict—New trial—Misdirection—Discretion.*

H. to qualify as candidate in a municipal election procured from a friend a deed of land giving him a contre-lettre under which he collected the revenues. Having sworn that he was owner of real estate to the value of \$2,000 B. in his newspaper accused him of perjury and he took action against B. for libel. On the trial the deed to H. was produced and the existence of the contre-lettre proved, but the notary having the custody of both documents refused to produce the latter, claiming privilege on the ground that it was a confidential document. The trial judge maintained this claim but the substance of the document was proved by oral testimony. A verdict having been given in favour of H.,

*Held, that the trial judge erred in ruling that the notary was not obliged to produce the contre-lettre and there should be a new trial.*

B. in his newspaper article, also accused H. of being drunk during the election, and the judge in charging the jury said: "You should consider the case as if the charge of drunkenness had been made against yourselves, your brother or your friend."

*Held*, that this was calculated to mislead the jury and was also a reason for granting a new trial.

If objection to one or more portions of the judge's charge is not presented until after the jury have rendered their verdict, the losing party cannot demand a new trial as of right, but in such case an appellate court, to prevent a miscarriage of justice, may order a new trial as a matter of discretion.

Appeal allowed with costs.

*Alex. Taschereau*, K.C., and *Cannon*, for appellant. *C. E. Dorion*, K.C., and *Alleyn Taschereau*, for respondent.

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Que.]

[Dec. 13, 1909.

**CITY OF MONTREAL v. MONTREAL LIGHT, HEAT & POWER CO.**

*Contract—Supplying electrical energy—Delivery—Use of force—Payment at flat rate—Sale of commodity—Agreement for service.*

A contract for the supply of electrical energy provided that the company should furnish to the city, at the switchboard in its pumping station, through a connection to be there made by the city with the company's wires, an electric current, equivalent to a certain number of horse-power units during specified hours daily, and the city agreed to pay for the same at the rate of "\$20 per horse-power per annum for the quantity of said electrical current or power *actually delivered*" under the contract.

*Held*, that by supplying the current on their wires up to the point of delivery the company had fulfilled their obligation under the contract, and was entitled to payment at the flat rate per horse-power per annum for the energy furnished, notwithstanding that the city had not utilized the force supplied during these specified hours by allowing it to pass into the city's motor.

Per *GIROUARD* and *ANGLIN*, JJ.—The agreement was a contract for the sale of a commodity.

Appeal dismissed with costs.

*Atwater*, K.C., and *W. H. Butler*, for appellant. *R. C. Smith*, K.C., and *G. H. Montgomery*, K.C., for respondent.

Ont.]

[Dec. 24, 1909.

## TORONTO RAILWAY CO. v. PAGET.

*Construction of statute—General Railway Act—Charter of company—Repugnancy.*

The Ontario Railway Act of 1906, 6 Edw. VII. c. 30, is by s. 5 made applicable to a Street Railway Co. incorporated by the legislature, but where there are inconsistent provisions, those of the special shall override those of the general Act. By s. 116 of the Railway Act a passenger on a railway train or car may be expelled for refusal to pay fare. By s. 17 of the special Act a passenger in such case is subjected to a fine.

*Held*, that these two provisions are not inconsistent and a conductor on a street railway car may lawfully eject a passenger who refuses to pay his fare.

Appeal dismissed with costs.

Nesbitt, K.C., and D. L. McCarthy, K.C., for appellant.  
Young and Lennox, for respondent.

Ref. P. C.]

Dec. 24, 1909.

IN RE GUARANTEE OF BONDS OF THE GRAND TRUNK PACIFIC  
RY. CO.

*Statutory contract—Construction bonds of railway company—  
Government guarantee.*

By contract with the G. T. Pacific Ry. Co. published as a schedule to 3 Edw. VII. c. 71, the Government of Canada agreed to guarantee the payment of bonds of the company to be issued for an amount equal to 75% of the cost of construction of the Western division. By a subsequent contract (sch. to 4 Edw. VII. c. 24) the Government agreed, subject otherwise to the provisions of the first contract, to implement its guarantee so as to make the proceeds of said bonds a sum equal to 75% of such cost.

*Held*, that the liability of the Government under the second contract was only to guarantee bonds of the company, the proceeds of which would produce a defined amount and was not to make up in cash or its equivalent any deficiency between such proceeds and the said 75% of the cost.

Shepley, K.C., for Government of Canada. Lafleur, K.C., and Biggar, K.C., for Grand Trunk Ry. Co.

## Province of Ontario.

### HIGH COURT OF JUSTICE.

Falconbridge, C.J.K.B.—Trial.] [Dec. 30, 1909.  
**FELKER v. MCGUIGAN CONSTRUCTION CO.**

*Expropriation of easements—Hydro-Electric Commission—Public Works Act—Trespass—Confiscation—Compensation.*

The defendants were contractors with the Hydro-Electric Power Commission of Ontario for the building of a line from Niagara Falls to transmit electricity to various municipalities. The line was to be carried on towers placed on private property or highways along the route, without any provision for right of way or protection of any kind; the intention being to use as an easement only such portion of the land as would be necessary to give a footing for the towers. The plaintiff objected to the placing of towers on her land on the ground that the mode of construction and operation of the line was a serious menace to life and property, and obtained an interim injunction to restrain the defendants from entering upon her land for the purpose of erecting towers. It was claimed by the plaintiff that the Hydro-Electric Power Commission and its contractors had no right to expropriate easements and compel owners of land to arbitrate on the supposition that the Public Works Act, which has a provision for compensation, was applicable. Sec. 9 of 7 Edw. VII. c. 19 provides that under certain circumstances the Commission shall have the right to proceed in the manner provided by the Public Works Act where the Minister of Public Works takes land and property for the use of the province. Sec. 10 of 9 Edw. VII. c. 19 provides that "in addition to all other powers, the Commission may, by purchase or otherwise, or without the consent of the owners thereof or persons interested therein, acquire, enter upon and take possession of and use a right or easement to construct, erect, maintain and operate transmission lines." Notices of expropriation had been served by the Commission claiming the right to take possession and to arbitrate which notices it was contended were delusive and not warranted, having no statutory authority.

*Held*, 1. As the jurisdiction of the provincial legislature having been held to be supreme within its own jurisdiction, it is clear that if it chooses "to confiscate the farm of the plaintiff without

any compensation there was a perfect right to do so in law, if not in morals."

2. That the reading of s. 10 of the Act of 1909 shews that the words "acquire, enter upon, take possession of," etc., are disjunctive, and cannot be read as if they were "may, if acquired, enter upon and take possession of, etc. The mere act of entering upon is to acquire. The easement contemplated by the statute is a very peculiar right entirely different from the expropriation that takes place where the actual fee of the land is taken and it was the intention of the legislature that this apparently arbitrary proceedings should be placed in the hands of the Commission."

3. As to whether the Public Works Act applies the learned trial judge said: "To invoke the Public Works Act is purely in aid of the plaintiff if they choose to give her the benefit of that Act; that may be the only remedy which she has for her compensation; that is the view that apparently was taken by the solicitor for the Commission. He served a notice under s. 47 of Public Works Act, and if that Act applied by implication to the Hydro-Electric Act, then a claimant himself has his remedy which he may pursue by the arbitration clauses of the Act. If that Act does not apply, so much the worse for the plaintiff, although it is not to be conceived that the legislature of the executive would allow her to go without any remedy or compensation."

4. The defendants have acted by the delegation from the Commission and are not trespassers.

Action dismissed and injunction dissolved with costs.

*Moss, K.C.*, for plaintiff. *Ritchie, K.C.*, for defendants.

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## Province of Nova Scotia.

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### SUPREME COURT.

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Full Court.]

SPAIN v. MCKAY.

[Dec. 11, 1909.

*Landlord and tenant—Distress and sale—Landlord debarred from purchasing—Costs—Party deprived of.*

A landlord who distrains upon the goods of his tenant cannot himself become a purchaser at the sale of the tenant's goods and, should he do so, will be held accountable in damages.

Where no order for judgment is taken and the whole matter is left to be disposed of by the trial judge, the court may make the order for judgment which the trial judge should have made.

The appeal was allowed with costs, but plaintiff was deprived of costs below because of the extravagance of his claims and untenable contentions set up with respect to the nature of his claim and the measure of damages.

*Robertson*, in support of appeal. *Kenny*, contra.

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Full Court.]

[Dec. 22, 1909.

**HALLISEY v. MUSGRAVE.**

*Sale of goods—Railway ties—Condition as to standard size—Evidence.*

Plaintiff supplied to defendant a quantity of railway ties under a contract which called for ties equal to the customary government standard. Subsequently, in response to an enquiry from defendant in relation to an additional supply, plaintiff waited upon defendant and verbally offered to furnish defendant with an additional quantity which defendant agreed to accept. Defendant thereupon addressed a letter to plaintiff embodying his understanding of the arrangement and confirming "contract for 2,000 ties, usual government standard size." This letter was received by plaintiff who thereafter commenced to supply ties, but it appeared that a number of the ties supplied were not of the size specified.

*Held*, setting aside the finding of the County Court judge with costs, that considering the previous dealings between the parties and the correspondence and the whole evidence, there should have been a finding that the contract was for the supply of ties of the government standard size.

*Robertson*, for appeal. *King*, K.C., contra.

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Full Court.]

**LESSER v. COHEN.**

[Dec. 22, 1909.

*Arbitration and award—Failure to attend after notice—Attempt to defeat award—Estoppel.*

On motion to set aside an award it appeared from the affidavits before the court that one of the parties to an arbitration, anticipating an award against him, purposely absented himself from the final meeting of arbitrators at which a conclusion was to be arrived at, and connived with one of the arbitrators to

do the same, with the view of preventing the holding of the meeting, of which both had notice, and thereby preventing the making of an award.

*Held*, that it was not open to such party to complain of the award made by the two remaining arbitrators in the absence of himself and the arbitrator who abstained from attending at his instance.

*Morrison*, K.C., in support of motion. *McCoy*, contra.

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Full Court.]

[Dec. 22, 1909.

**ROYAL BANK v. SCHAFFNER.**

*Contract—Equity running with—Offset—Accounting—Form of action.*

Defendants purchased from P. a quantity of saw logs in the Meander River, estimated at 500,000 feet, for the price of \$5. per thousand feet, and, in connection with the purchase, accepted an offer of P. to cut and haul the lumber for \$3 per thousand additional.

Defendants made advances to P. in connection with the contract and subsequently accepted an order in favour of the plaintiff bank for any balance due P. on account of the logs purchased, and the sawing and hauling thereof after payment of defendants' account.

The quantity of logs in the river fell largely short of that estimated and there was a breach on the part of P. of the contract to saw and haul which made it necessary for defendants to have the work done by others at an increased cost.

*Held*, that this was an equity running with the contract, and that defendants were entitled to offset the payments made by them resulting from the breach of contract on the part of P.

With respect to another lot of logs there appeared to have been an agreement that P. should do certain work and that defendants should supply funds and that P. should share in any margin after disposal of the lumber.

*Held*, that the most that P. would be entitled to under these circumstances was an accounting and that plaintiffs could not recover in their action as assignee of P. for lumber sold and services and supplies furnished.

*H. D. Mackenzie*, K.C., and *H. B. Stairs*, in support of appeal.  
*Mellish*, K.C., contra.

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Full Court.]            **WINGFIELD v. STEWART.**            [Dec. 22, 1909.

*Sale of goods—Statute of Frauds—Evidence of acceptance and receipt.*

In an action to recover the price of a motor boat alleged to have been sold by plaintiff to defendant, evidence was given to shew that after the date of the alleged sale, defendant on two occasions took pleasure parties out in the boat, and that he made use of plaintiff's mooring, with plaintiff's consent.

*Held* (MEAGHER, J., dissenting), that the evidence was sufficient to shew an acceptance and receipt of the boat by defendant within the Statute of Frauds.

*Tobin*, K.C., in support of appeal. *Power*, K.C., contra.

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Full Court.]            [Dec. 22, 1909.

**SILVER v. BURNS ET AL.**

*Master and servant—Wrongful dismissal—Conditional agreement—Death of party to—Burden of proof.*

In an action for wrongful dismissal it appeared that the plaintiff was employed to take charge of a fishing vessel owned by defendants for a specified fishing trip, and that at the time of hiring, a second trip was spoken of, but it was to be conditional upon the result of the first trip, and that defendants, being dissatisfied with the result of the first trip determined that they would not send the vessel upon a second trip, but would lay her up instead.

*Held*, that defendants were within their rights in doing so, and that plaintiff could not recover.

The contract of hiring upon which the action was brought was made verbally with one of the defendants who had died before the trial and no confirmatory evidence was given on the part of plaintiff.

*Held*, that plaintiff must also fail on this ground.

*O'Connor*, K.C., and *Matheson*, in support of appeal. *McLean*, K.C., contra.

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Full Court.]            **DEAN v. MCLEAN.**            [Dec. 22, 1909.

*Bills and notes—Defence of illegal consideration—Burden of proof.*

The defence to an action on a promissory note was that the note in question was given for money advanced by the plaintiff

with knowledge that it was to be used in an illegal stock jobbing transaction.

*Held*, by the majority of the court that in order to succeed in this defence it was necessary for the defendant to shew that he was engaged in an illegal transaction and that plaintiff knew when he advanced the money that it was to be used for the furtherance of such transaction, and that in the absence of such evidence there should be judgment for plaintiff for the amount claimed with costs.

**MEAGHER**, J., held that the judgment appealed from should be affirmed.

**W. B. A. Ritchie**, K.C., for the appeal. **Rowlings**, contra.

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Full Court.]            **THE KING v. LANDRY.**            [Dec. 22, 1909.

*Public schools—Election of trustees—Qualification of voters—Payment of poll tax.*

Application for leave to file an information in the nature of a quo warranto against defendant on the grounds that at a meeting of ratepayers called for the election of school trustees, at which defendant was elected, two of the ratepayers who voted for him were disqualified, being at the time in arrears for taxes, and a third, who desired to vote against him, was not permitted by the chairman of the meeting to do so. The evidence failed to support the first point, but it appeared that L., whose vote was rejected had only recently removed into the section and had not been assessed or paid a poll tax up to the date of the meeting, and that, at the meeting, he paid the amount of the poll tax, one dollar, to the secretary and claimed the right to vote under the Education Act, R.S. (1900), c. 52, s. 25, which provides that "on depositing \$1 any person who is liable to pay a poll tax and has paid all poll taxes previously imposed, including that of the current year, shall be qualified to vote."

*Held*, per **GRAHAM**, E.J., and **RUSSELL**, J. (**DRYSDALE**, J., dissenting), that the vote of L. was improperly rejected.

*Held*, per **RUSSELL**, J., that nevertheless the case was not to be dealt with in the same way as if it were an election petition, but that the allowance of the writ was discretionary and should be dealt with on grounds of public policy, and it was not in the interest of the public that the election contested should be disturbed, it being morally certain that the result embodied the determination of a majority of the qualified electors.

*Wall*, in support of application. **W. B. A. Ritchie**, K.C., contra.

Full Court.] IN RE JONES' TRUSTS. [Dec. 22, 1909.

*Wills—Devise of land with power of appointment coupled with duty—Sale of land and payment of proceeds to trust company—Effect of—Claim of apportionment—Parties.*

The will of B. devised to his daughter N. certain property enumerated to be disposed of in such manner among her children as she should by her last will appoint, and failing such appointment to be divided among such children share and share alike. By a deed of separation entered into between the appellant, one of the children referred to, and her husband, appellant conveyed to trustees all real and personal estate to which she was or might become entitled in expectancy, reversion, etc., under the will of B. "in trust to sell and convert the same into money, etc." The trustees concurred in the sale of certain real estate in which N. had a life estate and the proceeds were paid into the hands of a trust company to be held by them under the terms of the will and subject to the same conditions as the land.

It was claimed on behalf of appellant that the power of appointment given to N. ceased with her connivance in the sale of the property.

*Held*, 1. The appellant's expectancy, under the facts stated, remained in the same position as before the sale, the only difference being that the interest was in money instead of land.

2. The power given to N. under the will being coupled with a duty, no act on her part could destroy the trust imposed upon the land or the fund realized by the sale and that the trust imposed on the land must follow the fund in the hands of the trust company.

3. Any apportionment of the fund, as claimed, even if appellant's case was in other respects good was impossible, all proper parties not being before the court.

*Mellish, K.C.*, and *F. L. Davidson*, in support of appeal.  
*W. B. A. Ritchie, K.C.*, contra.

Full Court.] [Dec. 22, 1909.

SYDNEY BOAT AND MOTOR CO. v. GILLIES.

*Sale—Defence of defective condition—Evidence—Admissibility.*

On the second trial of an action brought by plaintiff to recover the contract price of a motor boat constructed by plaintiff for defendant, evidence was given to shew that the hull of the boat was not constructed in a workmanlike manner, and

that it would require the expenditure of a certain sum of money to make the seams and planking conform to the terms of the specifications.

*Held*, that such evidence was not receivable, it appearing that after the boat was completed and tendered to defendant the latter refused to accept delivery, and the boat was suffered to lie for some months exposed to the weather, and that the defects referred to were the result of such exposure and not of any fault in the original construction.

O'Connor, K.C., in support of appeal. *Rowlings*, contra.

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Longley, J.—Trial.]

[Jan. 6.

SYDNEY LAND AND LOAN CO. v. A SOLICITOR.

*Solicitor and client—Remuneration—Retainer—Commission—Debentures and interest overdue—Right to retain for—Character of instruments—Relation of debtor and creditor.*

Defendant, who acted as solicitor for the plaintiff company in proceedings against R., which resulted in the recovery of a considerable sum of money claimed the right to retain, in addition to the amount of his taxed costs and disbursements, the amount of certain bonds of the plaintiff company held by him and accrued interest which were overdue and unpaid at the time of the recovery of the money in question. He also claimed commission on the amount collected by him. The bonds in question were not secured in any way for the benefit of subscribers, but were rather in the nature of promissory notes, the plaintiff company undertaking to pay to the registered holders the amounts represented by the bonds at the date fixed and until payment to pay interest at the rate fixed.

*Held*, 1. Defendant, after the maturity of the bonds, was in the position of an ordinary creditor, and as such entitled to retain the amount as claimed.

2. The money received by defendant from R. was not to be regarded as being held by him in trust, and that he was entitled to deduct from it the amount due him.

3. *Quare*, whether the fact that defendant was a director of the company and as such aware of its financial position would not debar him from availing himself of the remedy that would be open to an ordinary creditor.

4. As to the amount claimed for commissions, there is no principle of law which justifies a solicitor in the absence of spe-

cial contract in retaining commissions on amounts received by him in his capacity of solicitor.

*W. B. A. Ritchie, K.C., for plaintiff. O'Connor, K.C., for defendant.*

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Longley, J.] DOMINION COAL CO. v. McINNES. [Jan. 12.

*Overholding tenant—Notice and failure to appear—Proceeding ex parte—County Court judge—Jurisdiction—Order to review proceedings refused.*

Defendant, a workman in the employ of the plaintiff company occupied one of the plaintiffs' houses under a lease which provided that his tenancy should cease when he left the company's employ. Defendant left the employ of the company on strike July 6th, 1907, and proceedings were begun under the Overholding Tenants Act, R.S. (1900) c. 174, in September following, which resulted in an order in plaintiff's favour being made by the County Court judge for District No. 7. On application for an order requiring the judge of the County Court to send up his proceedings for review,

*Held*, 1. While the order under s. 6 of the Act is in the nature of a certiorari it must be regarded as a special provision for a specific purpose and it was not the intention that it should issue on mere application, but that the powers of review vested in the court should not be exercised unless upon reasonable and substantial grounds.

2. A variance between the lease and the notice, in the description of the location of the house was not an irregularity calling for review where the notice was served upon defendant in the house in which he was living and he could have no difficulty in knowing the premises meant.

3. Notice given when defendant had been overholding for some time was within the terms of the Act.

4. Where defendant refused to appear after notice the judge of the County Court had jurisdiction to proceed ex parte.

5. Plaintiff company did not lose its right to proceed under the Act by having permitted defendant to remain on the premises for some months after he had quit work.

*W. B. A. Ritchie, K.C., in support of application. L. A. Lovett, contra.*

Full Court.]

THE KING v. DAVID.

[Jan. 17.

*Public Health Act—Removing flag or placard from house where infectious disease exists—Conviction for—Form of.*

Defendant was convicted, on the information of the health officer, of a violation of the provisions of the Public Health Act, R.S. (1900) c. 102, s. 48, for that he being the proprietor of a house in which an infectious disease existed did not display and keep displayed a yellow flag or placard, during the continuance of such disease, after being directed by the Board of Health so to do. The conviction imposed a fine of \$5 and costs "to be paid and applied according to law."

The evidence shewed the existence of an infectious disease in the house, and that a quarantine flag was put up under the direction of the Board of Health and that it was removed by a member of defendant's family.

*Held, affirming the judgment of the County Court judge for district No. 6, that defendant was properly convicted.*

Per GRAHAM, E.J., concurring, that the conviction should be amended by providing for payment of the costs of the informant and that the County Court judge's order affirming the conviction be amended by inserting a provision that the costs be paid within 30 days.

*J. A. Fulton, in support of appeal. J. L. Mackinnon, contra.*

Full Court.]

[Jan. 19.

OVERSEERS OF THE POOR v. STEVENS.

*Poor Relief Act—Support of pauper—Liability for—Directions as to mode of relief—Requirements as to past expenditures.*

Plaintiffs as overseers of the poor sought to recover against defendants, the father and grandfather respectively of E. M. a pauper, for moneys paid, laid out and expended by plaintiffs as such overseers for the relief and maintenance of the pauper and for services rendered, under the provisions of the Poor Relief Act, R.S. (1900) c. 50, s. 25.

The right to recover was based upon a report of the poor committee of the municipal council made to and adopted by the council regarding the support of the pauper in which the committee recommended that the husband or father of the pauper, if able, be called upon for her maintenance.

*Held, that in order to recover, there must be a direction as to the manner in which the pauper is to be relieved, and that*

in the absence of such direction and a refusal, the action could not be maintained.

*Held*, also, that the provision of the statute referred to did not cover a claim for past expenditures.

*Chesley*, in support of appeal. *F. W. O'Connor*, K.C., contra.

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Russell, J.]      **SILLIKER CAR CO., LTD. v. EVANS.**      [Jan. 25.

*Company—Subscription to stock—Condition—Removal of name from register.*

Defendant was solicited to take shares in a proposed company by H., who had been named a member of a committee appointed to obtain subscriptions to the stock of the company. H., acting under the alleged authorization of defendant to "put him down for \$200" entered his name upon the subscription paper for that amount (defendant being unable to write). Defendant was subsequently notified by the company that the shares applied for had been allotted to him and a call was made for payment of a part of the amount due. The notice of allotment was given and the call made April 9th, 1907, and on May 6th, 1907, defendant wrote the company claiming that his consent to take shares was subject to a condition which had not been fulfilled and repudiating any liability in connection with the subscription.

*Held*, that as the representative of the company thought defendant was agreeing absolutely to take shares while defendant thought he was only to take them in the event of the stipulated condition being performed, there was no consensus ad idem between the parties and no contract—not even a voidable contract—and under the authority of *Baillie's case* (1898), 1 Ch. 110, defendant was entitled to have his name removed from the register of the company.

Also that the delay mentioned was not fatal to defendant's right to apply to have his name removed, he being entitled to wait a reasonable time to see whether the condition would be performed.

*Allison*, for plaintiff. *Terrell*, for defendant.

## Province of Manitoba.

### COURT OF APPEAL.

Full Court.]

KING v. LAW.

[Dec. 6, 1909.

*Criminal law—Libel—Evidence to shew that accused cherished ill-feeling towards person libelled or her relatives—Inference from similarity of style and use of common terms in libellous and admitted writings—Proof of handwriting by evidence of experts only.*

1. At a trial for criminal libel, the prosecutor should not be allowed to give evidence of acts of hostility on the part of the accused towards the prosecutor or relatives leading only to the inference that the accused cherished feelings of ill-will towards the prosecutor; and, if such evidence has been admitted, although without objection, the jury should be told that they should give no weight to it.

2. A comparison of style and common forms of expression in the libellous and admitted writings should be by experts or skilled witnesses and, without such evidence, the trial judge should not invite the jury to draw any inference from such similarity in style or expressions.

*Scott v. Crerar*, 14 A.R. 152, followed.

Per PERDUE, J.A.:—When the only evidence of the handwriting of the accused is that of experts, and an equal number of experts contradict their opinions, the accused denying the authorship on oath, the jury should be told that the prosecutor had failed to establish the guilt of the accused.

*Patterson*, K.C., Deputy Attorney-General, for the Crown.  
*Dennistoun*, K.C., for the prisoner.

Full Court.]

[Dec. 13, 1909.

TIMMONS v. NATIONAL LIFE ASSURANCE Co.

*Practice—Particulars of malice in libel action—Interrogatories.*

Where the defendant has pleaded privilege in an action for libel, and anticipates that plaintiff will endeavour to prove malice to rebut the privilege, he is not entitled to an order requiring the plaintiff to furnish particulars of express malice charged by the plaintiff against the defendant as affecting the publication com-

plained of. Odgers on Libel and Slander (4 ed.), p. 600, and *Lever v. Associated Newspapers* (1907) 2 K.B. 626 followed.

When the defendant has not pleaded justification in an action for libel, he is not entitled to administer interrogatories asking the plaintiff if he did certain acts with a view to shewing that the statements in the alleged libel were true.

*Deacon*, for plaintiff. *Robson*, K.C., for defendants.

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Full Court.] RE SOMMERVILLE. [Jan. 17.

*Liquor License Act*, R.S.M. 1902, c. 101, s. 119—*Jurisdiction of County Court judge to entertain application to cancel license—County Court Judicial Division lying partly in one Judicial District and partly in another.*

Under s. 119 of the Liquor License Act, R.S.M. 1902, c. 101, if the licensed premises do not lie within the Judicial District for which the County Court judge is judge, he has no jurisdiction to entertain an application to cancel the license, although he is the judge for a County Court Judicial Division composed for the most part of territory in his Judicial District with the addition of a number of townships in the Judicial District in which are the licensed premises.

*Andrews*, K.C., for applicant. *Taylor*, K.C., contra.

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Full Court.] ROBINSON v. C.N.R. Co. [Jan. 17.

*Railway company—Railway Act*, 1903, ss. 42, 214, 242, 253—*Spur track facilities—Damages for refusal to supply—Limitation of lien for bringing action for—Board of Railway Commissioners—Jurisdiction of.*

Appeal from decision of METCALFE, J., noted, vol. 45, p. 612, dismissed with costs.

*Hudson*, for plaintiff. *Clark*, K.C., for defendants.

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#### KING'S BENCH.

Mathers, J.] [Dec. 20, 1909.

DOMINION EXPRESS CO. v. CITY OF BRANDON.

*Injunction—Levy of illegal tax by municipality—Interim injunction—Other adequate remedy.*

A party who brings an action against a municipality for a declaration that he is not liable for a tax imposed upon him,

and for an injunction to restrain the attempted levy of such tax, is not entitled to an interim injunction to restrain such levy, as he has another adequate remedy, namely, to pay the tax under protest and sue to recover it back. Joyce on Injunctions, par. 1189; *Dows v. City of Chicago*, 11 Wall. 108; *United Lines Telegraph Co. v. Grant*, 137 N.Y. 7, and *C.P.R. Co. v. Cornwallis*, 7 M.R. 1, followed; *Central Vermont Railway Co. v. St. John*, 14 S.C.R. 288, distinguished.

*Matheson and Hudson*, for plaintiffs. *Foley*, for defendant.

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**Macdonald, J.] IN RE NORTHERN CONSTRUCTIONS. [Jan. 10.**

*Company—Winding-up—Contributories—Allotment of promotion stock—Declaration of dividend impairing capital.*

*Held*, 1. An allotment of \$3,000 promotion stock in a company incorporated under the Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30, as fully paid-up stock, made after incorporation in favour of one of the incorporators whose original subscription was for \$4,000, for the alleged consideration of a transfer of good-will, will not, in a proceeding under the Dominion Winding-up Act, be any defence against an application by the liquidator to place such subscriber on the list of contributories for the full amount not actually paid in cash. *In re Jones & Moore Electric Co.*, 18 M.R. 549, followed.

2. The declaration of a dividend when the company is insolvent, contrary to s. 32 of the Act, and the application of such dividend in payment of shares in full cannot be allowed to stand, and in the winding up, the shareholders are entitled to no credit in respect thereof.

*Anderson, K.C.*, for the liquidators. *Haffner*, for creditors. *Jameson, Higgins and Manahan*, for respective shareholders.

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**Mathers, J.] BUCHANAN v. WINNIPEG. [Jan. 10.**

*Contract for building—Provision for cancellation when contractor fails to make satisfactory progress—Completion of work by proprietor—Who entitled to difference when cost of completion less than balance of contract price.*

After the plaintiff had done a considerable part of the work under a contract with the defendants for the building of a bridge he became unable to proceed with it, and the defendants under

a clause in the contract declared it forfeited and completed the work themselves at a cost less by about \$4,000 than the unpaid balance of the original contract price of the whole work and took over and used the bridge.

That clause provided for an indemnity to the defendants against all loss occasioned by the default of the contractor also that if the damage to the defendants resulting from such default should be less than the sum due to the contractor under the contract, then the difference should be paid to the contractor. It also provided that the contractor should have no claim for payment in respect of the work done after the cancellation of the contract.

*Held*, notwithstanding, that the plaintiff was entitled to the full balance of the contract price less the costs and expenses incurred by the defendants in completing the work.

*Elliott and Deacon*, for Buchanan. *T. R. Ferguson*, K.C., for Stewart. *Hunt and Auld*, for defendants.

Mathers, J.]

[Jan. 10.

CANADA FURNITURE CO. v. STEPHENSON.

*Principal and surety—Guaranty—Release of one or two or more joint and several guarantors—Plea of non est factum—Liability of wife under document signed at request of husband.*

*Held*, 1. If an instrument in the form of a joint and several guaranty to a number of creditors is altered after the signature of one of the guarantors by inserting the name of an additional creditor without the knowledge or consent of such guarantor, such alteration vitiates the instrument not only as against him but as against all the others who have signed, although such others signed after the alteration and with knowledge of it. *Ellesmere Brewing Co. v. Cooper* (1906) 1 Q.B. 75 followed.

2. A person who signs a document knowing its general character cannot succeed on a defence of non est factum, because it contains larger powers than he was led to believe by the person who induced him to execute it, or because he executed it without knowing or asking what it contained.

*National v. Jackson*, 33 Ch.D. 1, and *Howetson v. Webb* (1908) 1 Ch. 1 followed.

It is otherwise, however, when the document turns out to be of a character essentially different from what he supposed it to be, as in *Foster v. McKinnon*, L.R. 4 C.P. 704, and *Bagot v. Chapman* (1907), 2 Ch. 222.

3. A creditor cannot enforce a guaranty given by a married woman at the request of her husband at a time when, to the creditor's knowledge, she was not in a condition to take much interest in any document presented by her husband to her for signature, if it is proved that, as a matter of fact, the husband did not explain the nature of the document to her and she signed it without asking any questions, supposing it was something to assist her husband in his business.

*Chapman v. Bramwell* (1908) 1 K.B. 233, and *Turnbull v. Duval* (1902) A.C. at p. 434 followed.

4. When a married woman is induced by fraud and misrepresentation on the part of her husband and son to give her husband a power of attorney containing provisions of which she was not aware, under circumstances that should have put the husband's creditors upon inquiry as to whether deception was not being practised upon her in the matter, such creditors will not be allowed afterwards to enforce as against her a guaranty signed in their favour by the husband in her name under such power of attorney. *National v. Jackson*, 33 Ch.D. 1, followed.

*Hoskin*, K.C., and *Montague*, for plaintiffs. *Andrews*, K.C., *H. A. Burbidge*, *Fullerton* and *Foley*, for respective defendants.

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## Bench and Bar.

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### JUDICIAL APPOINTMENTS.

Charles Archer, of Montreal, K.C., to be puisne judge of the Superior Court of the Province of Quebec, vice Hon. Mr. Justice Curran, deceased. (January 11.)

Hon. William Alexander Weir, of Montreal, K.C., to be puisne judge of the Superior Court of the Province of Quebec, vice Hon. Mr. Justice Champagne, transferred to the District of Ottawa. (January 11.)

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## *IS CHRISTIANITY PART OF THE LAW?*

It has sometimes been said that Christianity is part of the common law of England, and if of England, then also of Ontario; but by this expression we must not understand that Christianity is even from a legal standpoint in any way the product of the State. No one, of course, pretends that Christianity is a religion devised and invented by the English people in the way they have devised and invented that system of law which goes by the name of common law. Christianity is not the result of popular custom crystallized by judicial decisions. It is something which existed before the common law had any existence, and when it is said that "it is part of the common law," no more would seem to be meant than this, viz., that the common law recognized, as a fact generally accepted by the people, that the Christian religion is true, and that it is beneficial to the State, that it should be protected, and that actions contrary or derogatory to that religion should be suppressed as being an offence not only against God, but against the commonwealth. Furthermore, in order to foster that religion, endowments were granted both by the State and individuals in England for the support of ministers of that religion, and many of its chief ministers were called on to take a leading part in the government of the country. The prominence and influence which the English archbishops and bishops thus early attained in political affairs in England was due, no doubt, very largely to their superior learning in an age of ignorance. A religion which was thus protected and supported by the State, and which was professed by the great majority of the people was so much a part of the constitution of things, that it came to be regarded as part of the law of the land, and offences against the Christian religion became offences against the State and punishable as such; and the Christian religion thus acquired in England a status which was unknown to the primitive church.

Bracton declares that "God is the author of justice, for justice is in the Creator, and accordingly right and law have the same significance." Bract. B. I., c. 3. Moreover, this same author says: "Let the King then attribute to the law what the law attributes to him, namely, dominion and power, for there is no King where the will and not the law has dominion; and that he ought to be under the law, since he is the vicar of God, appears evidently after the likeness of Jesus Christ, whose place he fills on earth."

The administration of law in England was regarded by that writer as a sacred duty demanding the highest mental and moral qualifications. Thus he says: "Let not one who is unwise and unlearned ascend the judgment seat which is, as it were, the throne of God, lest he convert darkness into light and light into darkness, and lest, with a sword in his untaught hand, as it were, of a madman, he should slay the innocent and set free the guilty, and lest he tumble down from on high, as from the throne of God, in attempting to fly before he has acquired wings." Bract. B. I., c. 2, s. 7. Furthermore, he says: "Jurisprudence is the knowledge of divine and human things, the science of what is just and unjust." Ib. c. 4, s. 4.

This association of the law with the Christian religion is manifested not only in the works of the early writers, but in the actual practice of the courts of law from the earliest times. Lord Bacon declared religion to be one of the pillars of the law.

It finds public expression to this day in England in the judicial attendance at public worship for the purpose of invoking the Divine blessing and guidance on the proceedings of the law courts, whether it be at the assizes, or on the general resumption of legal business after the long vacation, a practice which, unfortunately, we in Ontario have not preserved.

The same recognition by the State of the Christian religion is evidenced by statutes against blasphemy, and for the proper observance of the Lord's Day.

Prior to the Norman conquest bishops sat with the sheriff in the County Courts, the bishop's duty being to inform the people

of the law of God, and though this mingling of temporal and ecclesiastical law was put an end to by the Conqueror, yet the confining of ecclesiastical causes to the courts Christian, which he accomplished, was in effect also a public recognition of the Christian religion, if not as part of the law of the land, nevertheless as having a status as part of the established order of society, which no other religion possessed in England.

Turning to the utterances of judges we find there are many to be found affirming directly or indirectly that Christianity is part of the law of England. For instance: "The laws of the realm do admit nothing against the law of God." Hobart, C.J., in *Colt v. Glover* (1614) Hol. 149.

"The second ground of the law of England is the law of God." Hyde, J., in *Manby v. Scott* (1663) 1 Mod. Rep. 126.

Lord Hale, C.J., in *Taylor's Case* (1675) 1 Vent. 293, said: "Christianity is part of the law" and Lord Raymond, C.J., in *Rex v. Woolston*, Fitz. 64, 2 Stra. 834, declared: "Christianity, in general, is part of the common law of England and therefore to be protected by it."

Lord Kenyon, C.J., said, in *Williams' Case* (1797) 26 How. St. Trials 704: "The Christian religion is part of the law of the land."

"I apprehend that it is the duty of every judge presiding in an English court of justice, when he is told that there is no difference between worshipping the Supreme Being in chapel, church or synagogue, to recollect that Christianity is part of the law of England." Lord Hardwicke, L.C., in *In re Masters, etc., of Bedford Charity* (1819) 2 Swan. 527.

"It is certain that the Christian religion is part of the law of the land." Patteson, J., in *Rex v. Hetherington* (1841) 5 Jur. O.S. 530.

Lord Chief Baron Kelly, in *Cowan v. Milbourn* (1867) 2 L.R. Ex. 234, declared: "There is abundant authority for saying that Christianity is a part and parcel of the law of the land."

In *Pringle v. Napanee* (1878) 43 U.C.Q.B. 285, Harrison, C.J., declared that "an examination of the English law will be

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found to establish that Christianity in general, and not simply the tenets of particular sects, is a part of the common law of England, and that the cardinal doctrines of Christianity have been respected and guarded by the legislature and common law of the country," and he instances as legislative recognitions of Christianity the statutes for the proper observance of the Lord's Day (29 Car. II. c. 7), and the statute for the suppression of blasphemy (9 & 10 Wm. III. c. 32), both of which became part of the law of Ontario by virtue of the Constitutional Act, 49 Geo. III. c. 1 (U.C.).

When Christianity first appeared in the world it had no adventitious support from the temporal governments of the world. It was a purely voluntary society seeking to spread itself in the same way as any voluntary religious society to-day seeks to spread itself. No one could be compelled to join the society, and the only persuasions permitted were those addressed to the reason and the conscience. The reign of Constantine marks the era of the change of attitude of the State to the Christian religion. Thenceforward the Christian church was taken under the patronage of the temporal rulers of Europe, and though it acquired wealth and power, it was often at the expense of the sacrifice of spirituality.

In the heyday of the Church prosperity and patronage by the State, it is quite certain that methods were adopted by both Church and State for overcoming opposition to the tenets of the Christian faith of a far different kind from those employed by the primitive fathers, and the adoption of such methods, though attended with temporary success, has left a wound on the Church's reputation; because it is not unnaturally assumed by some that those who resorted to such methods were carrying out the principles of the Church whose ministers they were, though in truth and fact they were altogether misapprehending the spirit and true meaning of the religion they professed.

Who can now read of all the burnings and tortures of past ages done in the sacred name of the Christian religion without feeling how very far removed all such proceedings are from that

religion when properly understood? How much of this cruelty was due to a real, though mistaken, zeal for what was regarded as truth, and how much to a desire to enforce a system of spiritual tyranny and terrorism, who can tell?

Ever since the seventeenth century forces have been at work in England and among all English speaking people, which have materially modified the administration of the law in this respect. Toleration of all religious opinions which do not conflict with decency and public morality has also become a part of the law of the land; and this toleration, to be effective, must involve as a necessary consequence the right to advocate beliefs and doctrines contrary to the Christian religion. This changed condition of things has involved a change in the attitude of the courts to those who publicly advocate beliefs and doctrines contrary to Christianity. Provided they do so with some regard to morality and to a decent respect for the religious feelings of others, and has brought us back very far to the primitive condition of things.

Hence it has come to pass that greater latitude has of late years been allowed to the publication of books attacking the Christian faith, but although this may be done without fear of temporal punishment if the ordinary rules of decent argument are observed, it would be quite a mistake to assume that what may be done with impunity is nevertheless a lawful act in contemplation of law. As was said by Bramwell, B., in *Cowan v. Milbourn*, L.R. 2 Ex. 236: "A thing may be unlawful in the sense that the law will not aid it, and yet the law will not immediately punish it." And this distinction is not one of no importance, but may be found at times a sufficient ground for the avoidance of contracts. Thus, in *Cowan v. Milbourn*, the defendant contracted to let a room to the plaintiff for the purpose of delivering lectures which the defendant subsequently discovered were an attack on the Christian religion, and he then refused to allow the room to be used for that purpose by the plaintiff; and it was held that the purpose for which the room had been hired by the plaintiff was illegal, and the contract

was not enforceable; and to the same effect is *Pringle v. Napanee*, 43 U.C.Q.B. 285.

The altered attitude of the courts towards those who advocate doctrines inimical to Christianity appears from the following observations of the late Lord Chief Justice Coleridge. He says: "It is no longer true in the sense in which it was true when these dicta were uttered that 'Christianity is part of the law of the land.' Non-Conformists and Jews were then under penal laws, and were hardly allowed civil rights. But now, so far as I know the law, a Jew might be Lord Chancellor. Certainly he might be Master of the Rolls, and the great judge whose loss we have all had to deplore (Jessel, M.R.) might have had to try such a case, and if the view of the law supposed, be correct, he would have had to tell the jury, perhaps partly composed of Jews, that it was blasphemy to deny that Jesus Christ was the Messiah, which he himself did deny, and which Parliament has allowed him to deny, and which it was part of 'the law of the land' that he might deny." *Reg. v. Ramsay* (1883) 15 Cox C.C. 235; and in another case he said: "I for one would never be a party, unless the law were clear, to saying to every man who put forward his views on those most sacred things, that he should be branded as apparently criminal because he differed from the majority of mankind in his religious views or convictions on the subject of religion. If that were so, we should get into ages and times which, thank God, we do not live in, when people were put to death for opinions and beliefs which now almost all of us believe to be true": *Reg. v. Bradlaugh* (1883) 15 Cox C.C. 230.

It is well known that many learned men of the present day deny the Mosaic account of the creation of man, and prefer to think that they are merely improved monkeys, and others delight themselves in discovering what they believe to be flaws in those Scriptures on which the credibility of the Christian religion is based; and these men from time to time publish to the world the result of their investigations which are by some thought to be, and are certainly intended to be, destructive of faith in the truth of Christianity; nevertheless such writings,

so long as they refrain from abuse and vituperation, and keep within the ordinary bounds of morality, are allowed to pass unnoticed by the law; but this freedom from penal consequences can hardly be rightly construed as indicating any real alteration in the fundamental rule witnessed to by so many legal sages of the past, to the effect that Christianity is a part of our law, and is still a veritable and effective part of it; but it rather indicates that the law deems it to be a saner method of maintaining the Christian faith, to reason with, rather than punish, those who have the misfortune to be unconvinced of its truth, or inclined to controvert it.

No harm happens to society from a few men thinking themselves improved monkeys rather than the subjects of a special creation, so long as they do not think fit to adopt the morals of monkeys, which might indeed prove very detrimental to society. Neither is society much harmed because a few men delight to think that they have discovered that the writings ascribed to certain persons in the Scriptures were not in fact written by them, or that the generally received date of certain writings is not the true date. From a Christian standpoint, however, those who for any reason are led to deny the Christian faith, ought to be objects of pity and commiseration rather than subjects for punishment as criminals.

G. S. H.

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#### *HIS HONOUR THOMAS HODGINS, LL.D.*

There has passed from amongst us one of the most learned as well as one of the most respected members of the profession in this country—His Honour Thomas Hodgins, M.A., LL.D., judge of the Admiralty Division of the Exchequer Court and Master in Ordinary of the Supreme Court of Ontario. He died suddenly at his residence in the city of Toronto on the 14th ult. He was in the act of telephoning to his stenographer in reference to some alterations he desired to make in some manuscript when the call came that waits for no answer, and death ensued from heart failure during the conversation. We can well believe that his desire was to die in harness, and so he did.

Mr. Hodgins had passed man's allotted span of life; but shewed but little decadence from the activity of former years. He was born in Dublin in 1828. Twenty years afterwards he immigrated to Canada. His education began in Bristol and was completed at the University of Toronto, where he won the University scholarship in civil polity and history, and graduated in 1856 with first-class honours. He was created a Q.C. for the Dominion in 1873, and received a similar honour from the Ontario Government in 1876. He took an active part in the affairs of the Law Society of Upper Canada, becoming a Bencher in 1874 and Chairman of the Legal Education Committee of the Society in 1875. He was senior law examiner of the Faculty of Law in the Toronto University for a considerable period.

Mr. Hodgins has been a frequent and valued contributor to this journal, being in his earlier years on its staff as reporter of cases in the then Court of Chancery. In later years his articles have mainly been on constitutional subjects. He has also been the author and editor of various legal works—Annotation of the Franchise Acts, and Voters' List Acts, Reports of election cases, etc., A treatise on the Bills of Exchange Act, and other works. The book of most public interest is on British and American Diplomacy affecting Canada—a chapter of Canadian History between 1782 and 1889. Whilst we trust we have seen the last of unkind feeling arising from questions of boundary between Canada and the United States, the information given in this work is of great value, shewing most industrious research, and it may be relied upon as historically accurate.

In 1883 Mr. Hodgins was appointed Master in Ordinary of the Supreme Court of Ontario, and subsequently Judicial Referee under the Drainage Laws.

Mr. Hodgins was appointed local judge in Admiralty for the Toronto District, a position the duties of which were of great interest to him and performed with his usual painstaking care and industrious research. In matters connected with constitutional law he was one of the best read lawyers in the Dominion. It was a subject which he had made his own so far as the

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Dominion of Canada was concerned and many of his articles on this subject have appeared in this journal as well as in some of the leading English reviews.

As a member of the Canadian Volunteer Force he saw service as a member of the University Rifles in the Fenian Raid in 1866, and as a member of the Church Militant for many years took an active interest in the proceedings of the Synod of the Diocese of Toronto.

His was a full, active and useful life. Both at the Bar and on the Bench he was deservedly popular, and was held in respect for his impartiality, patience and courtesy. In private life a large circle of friends will mourn his loss. Tributes to his memory were paid by several of the judges of the Ontario Bench, on the meeting of their courts the day after his death, which we gladly reproduce.

Sir Charles Moss, President of the Supreme Court of Judicature said: "I believe that everybody who knew him or came in contact with him in these important duties will agree that in the exercise of them he always performed his duty as he saw it. Gifted with an infinite capacity for taking pains, he possessed large stores of legal knowledge. But he went further and branched out into broader and more comprehensive fields.

"As a man he was kindly and genial in manner. Courteous and considerate he always was.

"For myself and my colleagues I can but deeply voice regret for the event which has removed one who earned our highest respect and esteem. He died as I believe he would have wished, with his mental faculties unimpaired."

Sir John Alexander Boyd, President of the High Court of Justice, said: "Since the court was last in session, suddenly has come the inevitable call to one whom we know rather as Master in Ordinary than as local judge of the Admiralty Court. Mr. Justice Hodgins lived to a good old age and filled his judicial offices with competent and efficient service. It is as a judge that his industry and patience and integrity are to be commended in this place. He was an erudite and painstaking judge who always

sought to do what he believed to be right. No greater encomium can be paid upon any judicial officer than that which is applicable to him; his constant endeavour was to arrive at the truth in order to give effect to what appealed to him as the very right and justice of the case. His passing is a distinct loss to the public service of the country. All his large and ripe experience cannot be replaced."

Sir Glenholme Falconbridge, President and Chief Justice of the King's Bench, said: "Mr. Hodgins' manners were characterized by that polished urbanity which we always find pleasing, even though we know or suspect that it is a mere artificial veneer. But in his case it was the outward manifestation of true benevolence of disposition, and kindness of heart.

"As to his intellectual achievements, he was not alone distinguished in the general domain of law, but he had made himself known as a high authority in international questions, in constitutional law, diplomacy and parliamentary practice. He loved his country as he loved his alma mater, with a pure and lofty fervour; and he gave of his best to the service of both—his time, his talents, his tongue and pen. He was a fine example of altruism in an age which is generally characterized by selfishness and egoism. May God rest his soul in peace."

The family has become well known in this country. His elder brother, John George Hodgins, LL.D., has rendered splendid service for the province in connection with its educational system, having occupied prominent positions in connection therewith. As historiographer of the Educational Department of Ontario he was at the time of his death engaged in preparing a work in four volumes on "The Documentary History of Education in Upper Canada." One of the sons of the deceased is in the Royal Artillery. His nephew, Frank E. Hodgins, K.C., a son of Dr. Hodgins, occupies a prominent place at the Bar of Ontario. His brother, Col. Hodgins, is one of the most enthusiastic of our staff commanding officers and is D.O.C. at London, Ontario.

**REVIEW OF CURRENT ENGLISH CASES.**(Registered in accordance with the Copyright Act.)

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**SETTLEMENT—REAL PROPERTY—APPOINTMENT—REMOTENESS—  
RULE AGAINST DOUBLE POSSIBILITIES—SUCCESSIVE LIMITATIONS  
TO UNBORN CHILDREN—ELECTION.**

*In re Nash, Cook v. Frederick* (1910) 1 Ch. 1. This was an appeal from the decision of Eve, J., 1909) 2 Ch. 450 (noted ante, vol. 45, p. 746). Two points were involved in the case. First, whether the rule against double possibilities applied to the limitation of equitable estates, and second, whether, where an assumed exercise of a power by will fails on the ground of its offending against the rule against double possibilities, those who benefit by such failure are put to an election whether they will confirm the will, or accept the benefits given them by the will. Eve, J., held that the rule against double possibilities does apply to the limitation of equitable estates, but where an appointment by will fails because it offends against the rule no case of election arises, and his decision is now affirmed on both points by the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.J.J.).

**RAILWAY—GRANT OF LAND TO RAILWAY COMPANY—AGREEMENT TO  
PERMIT GRANTOR TO MAKE A TUNNEL—TIME AND PLACE NOT  
SPECIFIED—UNCERTAINTY—PERPETUITY—ULTRA VIRES—AS-  
SIGNABILITY OF AGREEMENT.**

*South Eastern Ry. v. Associated Portland Cement Manufacturers* (1910) 1 Ch. 12. In 1847 one Calcraft entered into an agreement with the plaintiffs to sell to them certain lands for the purposes of their railway, subject to a stipulation that Calcraft and his assigns might at any time construct a tunnel under the land to be conveyed. A conveyance was subsequently made by Calcraft to the plaintiffs which excepted and reserved to Calcraft and his assigns the right to construct a tunnel under the lands conveyed. Calcraft died and his universal successor made a lease of part of the land severed by the railway, and also assigned to the lessee during the continuance of the demise the benefit of the agreement of 1847, and the defendants having become the assignee of the lease were about to construct a tunnel,

and this action was brought to restrain them from so doing. The plaintiffs contended that the agreement, and the reservation and exception in the deed, were void for uncertainty for not specifying a time when or a specific place where the tunnel was to be made, and that they were also void as offending against the law of perpetuities, and also that the defendants were not entitled to the benefit of the agreement. Eady, J., who tried the action, held that as against the original covenantors, the railway company, the provision in the agreement as to the tunnel was a personal contract and was not obnoxious to the rule against perpetuities, and that the benefit of the contract could be assigned and had been validly assigned to the defendants, during the continuance of their term; and on both these points he was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.J.J.). Eady, J., also held that the reservation in the deed amounted to a regrant of an easement by the plaintiff, and was not void for uncertainty and was not ultra vires of the railway company, but on these points the Court of Appeal expressed no opinion.

**EXPROPRIATION — COMPULSORY PURCHASE — WIDENING STREET —  
NOTICE TO TREAT—LANDOWNER REJECTING OFFER—WITHDRAWAL OF NOTICE—DAMAGES.**

In *Wild v. Woolwich* (1910) 1 Ch. 35, a notice had been given by a municipal corporation to treat for the purchase of land for the widening of a street. The landowner rejected the proposed offer on the ground that more land was proposed to be taken than was necessary, the corporation then withdrew the notice, and the plaintiffs then brought the present action to recover damages occasioned by service of the notice. Eve, J., held that they were not entitled to succeed and the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Buckley, L.J.J.) affirmed his decision, holding that where a notice to treat is served the landowner must either treat the notice as good, or repudiate it as a whole, but cannot accept it in part, and reject it in part; and where he has not accepted it as a whole, the notice may be withdrawn, without imposing on the corporation giving the notice any liability for damages.

VENDOR AND PURCHASER—DOUBTFUL TITLE—DIFFICULT QUESTION OF CONSTRUCTION—VENDORS' AND PURCHASERS' ACT—ORIGINATING SUMMONS—COSTS.

*In re Nichols & Von Joel* (1910) 1 Ch. 43. In this case an application was made under the Vendors' and Purchasers' Act to determine a question of title, Neville, J., before whom the application was heard, finding that the question turned on the construction of a will, thought the title ought not to be forced on the purchaser, but offered before disposing of the matter to give the vendor an opportunity of applying on an originating summons for a construction of the will, which offer was declined and the application was accordingly dismissed. On appeal to the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.J.J.) that court made the same offer which the vendor then accepted, and an application was then made on an originating summons to determine the question of construction which the court found in favour of the vendor. In these circumstances the Court of Appeal on the new evidence allowed the appeal and declared in favour of the title, but ordered the vendor to pay the costs of the appeal and of the motion before Neville, J.

INJUNCTION—NUISANCE— POLLUTION OF STREAM — SUBSEQUENT REMEDY OF OBJECTION—REVOCATION OF INJUNCTION.

*Attorney-General v. Birmingham* (1910) 1 Ch. 48. In this case a perpetual injunction had been granted by Kekewich, J., restraining the defendants, a municipal corporation, from polluting a stream by discharging sewage into it. An appeal was taken from his judgment, and pending the appeal the defendants had, by the expenditure of £500,000, removed all ground of complaint, and it was now contended that although the injunction was rightly granted, yet in the altered state of circumstances it should now be discharged. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.J.J.) having directed an examination by an expert and being satisfied by his report that all ground of complaint had been removed, discharged the injunction.

WILL—LEGACY TO FOUND BED IN HOSPITAL.

*Attorney-General v. Belgrave Hospital* (1910) 1 Ch. 73. A testatrix by her will having given a legacy of £1,000 to found a bed in a hospital, Eady, J., was asked to decide in what manner

the fund ought to be applied, and he held that the capital must be invested, and the income to be derived therefrom must be applied in maintaining the bed. The hospital had treated the legacy as applicable to the general purposes of the hospital, and as merely giving the testatrix the right to have a particular bed named after her. But Eady, J., considered this was not an admissible method of dealing with the fund. It will be well for solicitors of charitable institutions to take notice of this case as dealing with a point which is constantly arising.

**SETTLEMENT—APPORTIONMENT OF SPECIFIC SUMS OF STOCK—SURRENDER OF APPOINTOR'S LIFE INTEREST—DEATH OF APPOINTOR—HOTCHPOT—DATE AT WHICH VALUE OF APPOINTED STOCKS SHOULD BE ASCERTAINED.**

*In re Kelly, Gustard v. Berkeley* (1910) 1 Ch. 78. In this case a donee of a power of appointment over a trust fund invested in stock in which the donee had a life interest appointed part of the stock, and released her life interest to the appointee, the appointment providing that in case the appointee should become entitled to any part of the unappointed fund she should bring the part appointed to her into hotchpot. The tenant for life having died, and the appointee having become entitled to a share of the unappointed fund, it became necessary to determine at what period of time the value of the stock appointed was to be ascertained, and Warrington, J., held, that the value must be ascertained at the date of the death of the tenant for life, and not at the date of the appointment, because so long as the tenant for life was alive, the appointee was in possession in the place of the tenant for life.

**RESTRICTIVE COVENANTS—BUILDING SCHEME—SUBSEQUENT PURCHASERS—RIGHT OF SUB-PURCHASERS TO ENFORCE COVENANTS MADE TO A PRIOR VENDOR—NOTICE OF RESTRICTIVE COVENANTS.**

*Willé v. St. John* (1910) 1 Ch. 84 was an action to enforce a restrictive covenant in the following circumstances. Du Cane, being owner of a tract of land, sold 14 acres of it to Holmes, and took from him a covenant not to erect any buildings except dwelling houses upon the fourteen acres. Holmes sold part of the land to the plaintiff and part to the defendants. Neither the plaintiffs nor the defendants entered into any restrictive covenants, but they had notice of the covenant made by Holmes with Du Cane. The defendants erected a church on part of the land

bought by them, which the plaintiffs claimed was a detriment to them, and a breach of the restrictive covenant which Holmes had given to Du Cane, and which they claimed to be entitled to enforce. Warrington, J., who tried the action, however, held that they had no such right, because there was no evidence of the covenant being given in pursuance of, or to carry out, any building scheme, that the mere registration of the covenant did not have the effect of annexing it to the land, that there was no imposition of the covenant by the common vendor of the plaintiff and defendants in furtherance of any building scheme, and neither party purchased their lots on the footing that the covenant in question was to enure for the benefit of the other lots. He held that the covenant in question was one intended merely for the benefit of Du Cane as owner of the rest of the estate of which the fourteen acres had formed part, which was not enforceable by any one but Du Cane or his representatives.

SOLICITOR—SOLICITOR AND AGENT—AGENT'S BILL OF COSTS—TAXATION—ORDER OF COURSE—SOLICITORS' ACT, 1843 (6-7 VICT. c. 73), s. 37—ATTORNEYS' & SOLICITORS' ACT, 1870—(33-34 VICT. c. 28), ss. 3, 17—(R.S.O. c. 174, s. 35).

*In re Wilde* (1910) 1 Ch. 100. A country solicitor having employed his London agent to transact certain business for which the latter was entitled to costs, obtained an order of course for the delivery by the agent of his bill of costs. This order the agent contended was irregular because the relation of solicitor and client did not exist between a solicitor and his London agent, and he having refused to deliver his bill pursuant to the order, a motion for an attachment was made against him for contempt, whereupon the agent also moved to discharge the order. Both motions were heard together, and Neville, J., who heard them, decided that although prior to the Solicitors' Act of 1843, there did not appear to have been any power at common law to order taxation of an agent's bill, and it was only ordered in Chancery on the terms of bringing the amount of the bill into court, yet that since the Act a different rule prevailed and that under s. 37 (R.S.O. c. 174, s. 35) the country solicitor was entitled as a "party chargeable" to have a taxation of his agent's bill without any terms being imposed, and the order of course was therefore regular, and the agent was ordered to deliver his bill within 21 days and pay the costs of both motions.

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MOTOR CAR—DRIVER EXCEEDING SPEED LIMIT—POLICE—WARNING GIVEN BY THIRD PERSON—WILFUL OBSTRUCTION OF CONSTABLE IN EXECUTION OF HIS DUTY—PREVENTION OF CRIMES AMENDMENT ACT, 1885 (48-49 VICT. c. 75) s. 2—(CR. CODE, SS. 168, 169).

*Betts v. Stevens* (1910) 1 K.B. 1 was a prosecution for obstructing a constable in the execution of his duty. The facts were that with a view to preventing motors from travelling at an excessive speed, certain police officers had measured a mile of a travelled road, and set a watch for observing the speed of motor cars driven along the road. The defendant with the object of preventing drivers from being caught, had, as they approached the measured mile at an illegal speed, signalled the drivers whereby they were informed that they were being watched, and thereupon they lowered their speed to a legal rate. The magistrates convicted the defendant, but stated a case for the opinion of a Divisional Court (Lord Alverstone, C.J., and Darling and Bucknill, JJ.), who affirmed the conviction. It is pointed out that a great deal depends on the apparent intention of giving such a warning. If it were given solely with the object of preventing the commission of an illegal act, it would not be unlawful; if, however, the apparent object of the warning is merely to induce the offender to suspend his illegal act only so long as there is danger of detection by the police, then the warning becomes an unlawful obstruction of the police in the execution of their duty.

CRIMINAL LAW—SERVANT'S CHARACTER—FALSE CHARACTER—VERBAL REPRESENTATION—CONSPIRACY—SERVANTS' CHARACTERS ACT, 1792 (32 GEO. III. c. 56), ss. 2, 3.

*The King v. Costello* (1910) 1 K.B. 28. This case was a prosecution under the Servants' Characters Act, 1792 (32 Geo. III. c. 56), for giving a servant a false character; and the principal question was, whether in order to come within the Act the character must be given in writing. The words of the Act are, "if any person or persons shall knowingly and wilfully pretend or falsely assert in writing," etc. The Divisional Court (Lord Alverstone, C.J., and Darling and Bucknill, JJ.) held that the words "in writing" only qualify the word "assert," and do not apply to the words "knowingly and wilfully pretend," and therefore that a false verbal representation as to a servant's character is within the Act. We may note that this Act seems

to be one which became part of the law of Upper Canada and would seem to be still in force in Ontario, although we do not recollect to have come across any case in which it was in question.

**CONTRACT—HUSBAND AND WIFE—CONTRACT BY HUSBAND WITH WIFE TO PAY HER A SUM IN CASE HE SHOULD BE GUILTY OF CONDUCT ENTITLING HER TO A SEPARATION—VALIDITY OF AGREEMENT—PUBLIC POLICY.**

*Harrison v. Harrison* (1910) 1 K.B. 35. This was an action by a wife against her husband to enforce an agreement for the payment of a sum of money. The defendant had been convicted of cruelty to the plaintiff, and a separation order had been made by justices. In order to induce the plaintiff to return to co-habitation with the defendant he agreed that, in the event of the defendant thereafter being guilty of conduct entitling the plaintiff to a separation, he would pay her the sum of £150, and on such payment she agreed not to demand or receive any weekly sum under any further separation order. The plaintiff returned to live with the defendant, who again assaulted her, whereupon she obtained a further separation order and brought the present action to recover the sum of £150. The defendant contended that the agreement was void as being made in contemplation of a future separation and was therefore contrary to public policy. Walton, J., who tried the action, held that that objection was not tenable, and gave judgment for the plaintiff for the full amount claimed.

**WRIT OF SUMMONS—SPECIAL INDORSEMENT—SPEEDY JUDGMENT—AFFIDAVIT IN SUPPORT OF MOTION—FOREIGN PLAINTIFF—AFFIDAVIT OF SOLICITOR—INFORMATION AND BELIEF—RULES 16, 115—(ONT. RULES, 138, 603).**

*Lagos v. Grunwaldt* (1910) 1 K.B. 41. In this case a motion for speedy judgment was made upon a specially indorsed writ. The plaintiff was a foreigner resident out of the jurisdiction, and the affidavit in support of the motion was made by his solicitor on "information and belief." The claim was for professional charges rendered by the plaintiff as a foreign solicitor, and the balance claimed was £1,469 4s. 1d. The Master gave the defendant leave to defend on certain terms, including the payment into court of £400 within fourteen days. Sutton, J., affirmed this order, and from it the defendant appealed, claiming to be entitled

to unconditional leave to defend. The defendant objected that the claim was not "a debt or liquidated demand," and therefore not the subject of "special indorsement," but the Court of Appeal (Cozens-Hardy, M.R., and Farwell, L.J.) overruled this objection. But on the point of the sufficiency of the affidavit filed in support of the motion, the Court of Appeal were in defendant's favour, and held that under Rule 115 (Ont. Rule 603) an affidavit founded on information is not sufficient to give the court jurisdiction, it not being an affidavit by "a person who can swear positively to the debt or cause of action."

SUNDAY OBSERVANCE—CONSENT TO PROSECUTION—SUNDAY OBSERVANCE PROSECUTION ACT, 1871 (34-35 VICT. c. 87), ss. 1, 2 AND SCHEDULE—(R.S.C. c. 153, s. 17).

*The King v. Halkett* (1910) 1 K.B. 50. In order to prevent oppressive prosecutions for non-observance of the Lord's Day Act (29 Car. II. c. 7), it is provided by the Sunday Observance Prosecution Act, 1871 (34-35 Vict. c. 87) that no prosecution is to be brought under 29 Car. II. c. 7, without the consent of the chief constable or other officer by whatever name called, having the chief command of the police in the police district. In this case the chief constable was away on his holidays, and a superintendent of police was discharging his duties during his absence, but the Divisional Court (Lord Alverstone, C.J., and Darling and Bucknill, JJ.) were of the opinion that his consent was not sufficient under the statute to warrant a prosecution, and the conviction was quashed. A similar provision is to be found in R.S.C. c. 153, s. 17, and from this case it would appear that no one but the Provincial Attorney-General in person is competent to give a consent under that section.

MONEY PAID UNDER MISTAKE OF FACT—MUTUAL MISTAKE—ACTION TO RECOVER MONEY PAID UNDER MISTAKE—STATUTE OF LIMITATIONS—WHETHER NOTICE TO OPPOSITE PARTY OF MISTAKE IS NECESSARY TO COMPLETE CAUSE OF ACTION—9 GEO. IV. c. 14, s. 4—(R.S.O. c. 146, s. 5).

*Baker v. Courage* (1910) 1 K.B. 56. In this case the plaintiff was a licensed victualler and the defendants a brewery company. In February, 1869, the plaintiff being a lessee for a long term of a public house subject to a mortgage to the defendants, acquired the reversion; £1,000, part of the purchase money, being secured

by mortgage of the freehold to the vendor. In March, 1896, the plaintiff agreed to sell his leasehold and freehold interests together with his stock in trade to the defendants. In order to facilitate the transaction the defendants lent the plaintiff £1,000 to pay off the mortgage on the freehold. The same solicitors acted both for the plaintiff and defendants, and in the final adjustment of accounts to ascertain the balance payable to the plaintiff the £1,000 thus lent was omitted to be debited to the plaintiff; and on March 31, 1896, the balance, according to this erroneous account, amounting to £9,000, was paid to the plaintiff. On the day following the plaintiff deposited the £9,000 with the defendant at interest, and from time to time drew out portions, until in January, 1909, there being only a balance of £1,000 remaining, the plaintiff gave notice of his intention to withdraw it. Just before the receipt of that notice the defendants instituted inquiries to find out what amount the house purchased from the plaintiff had cost them, and the mistake as to the £1,000 was then discovered; they, therefore, refused to pay the \$1,000, and this action was brought to recover it, and the defendants set up the payment by mistake by way of set-off and counter-claim, to which the plaintiff pleaded the Statute of Limitations. The defendants contended that the cause of action for the recovery of the money paid by mistake did not arise until the mistake was discovered and notice given to the plaintiff; but Hamilton, J., who tried the action, came to the conclusion that the defendant's cause of action arose when the money was paid, and that from that time the statute began to run, and that consequently the defendant's claim was barred, and the plaintiff was entitled to judgment for the amount claimed: see R.S.O. c. 146, s. 5, which is taken from Imp. St. 9 Geo. IV. c. 14, s. 4. Having regard to the result in this case it may well be doubted whether this section is in furtherance of justice. There might be some reason in allowing the statute to be pleaded as to any sum claimed by a defendant by way of set-off over and above the plaintiff's demand; but the same reason obviously does not apply to so much of the set-off as equals the plaintiff's claim.

## Correspondence.

### **THE POWER COMMISSION AND THE ATTORNEY-GENERAL'S FIAT FROM THE STANDPOINT OF THE COMMON LAW.**

*To the Editor, CANADA LAW JOURNAL:*

SIR,—It is my intention to discuss, from the point of view of English common law and practice, s. 23 of the Power Commission Act, 1907, and the use made of his powers thereunder by the Attorney-General for Ontario, in order to discover what, if any, support can be supplied from that source to the action of the legislature and the Attorney-General.

That section provides that "without the consent of the Attorney-General, no action shall be brought against the Commission or against any member thereof for anything done or omitted in the exercise of his office," and it seems clear that if the provision had not been inserted in the Act or if the Attorney-General had not interpreted and applied it as he has, the lieges of Ontario would have been able to appeal to their own courts for the ascertainment and the establishment of their rights, and the subsequent troubles, accompanied—one cannot say cured—by the subsequent legislation, would have been avoided.

In England, there are only four classes of civil suits in which the subject has to obtain the fiat or allowance of the Crown or of the Attorney-General before he can commence proceedings, namely, (1) actions by the Attorney-General with a relator; (2) petitions of right; (3) scire facias on lunacy bonds, where the bond is put in suit for a private solicitor; and (4) petitions with request to charities under the Charities Procedure Act, 1812 (52 Geo. III. c. 101). The latter two cases need not be further considered—they have nothing to do with the matter which I am now discussing; but a short examination of the former two cases will shew how widely different they are from the case of actions against the Hydro-Electric Power Commission and its members. In neither case is the necessity for a fiat the creation of statute (the Petition of Rights Act, 1860, 23 & 24 Vict. c. 34), merely regulates procedure and does not affect the prerogative.<sup>1</sup> In

1. *Tobin v. R.* (1863) 22 L.T.C.P. 216, at p. 221, per Erle, C.J. The report of the passage in 14 C.B.N.S. 505, at p. 521, is not so complete.

the case of an action (formerly called an information) by the Attorney-General with a relator, a member of the public wishing to enforce a public right or to prevent a public injury merely as a member of the public and where his own private rights are not affected and he has suffered no special damage, has to request the Attorney-General to allow him to use the name of the Attorney-General as plaintiff, with or without himself as co-plaintiff. This form of action seems to have been derived from the early form of proceedings in which a Crown grantee, or a person claiming under the Crown, sued in the Crown's name in order to obtain the advantage of the prerogative.<sup>2</sup> It is clear that the necessity of obtaining the Attorney-General's permission in this form of action forms no precedent at all for the provisions of s. 23<sup>3</sup> of the Power Commission Act, 1907.

Let us now turn to the case of Petitions of Right. It is a very ancient principle of the common law that the King is not liable to be sued by a subject—some writers say this was because "the King by his writ cannot command himself," but more probably it was because the King cannot be sued in his own court. But from very early times it was the practice of the Crown to abate its prerogative to such an extent as to permit a subject (then called the suppliant) to proceed against the Crown by a petition of right or a *monstrans de droit* in a proper case, that is to say, where there was a reasonable cause of action, and a cause of action which was of such a nature that it was compatible with the prerogative.<sup>4</sup> At the present day the practice is regulated by the statute referred to above, but the principles on which the fiat is granted and refused remain as they always were at common law. It may be stated generally that petition of right is the process by which recovery is made from the Crown of property of any kind, including money, to which the subject is legally or equitably entitled, except in cases where the process is noted by some statutory mode of recovery.<sup>5</sup> It is necessary to use this process not only against the Crown itself, but also against government departments exercising prerogative powers, except in certain cases where there is statutory provision for suing the department

2. See Robertson, *Civil Proceedings by and against the Crown*, pp. 464, 465.

3. *Sadlers Company's case* (1588) 4 Co. Rep. 54b, at p. 55a; Comyns, *Dig. Action*, c. 1; *Prerogative*, D. 78, and see Robertson, *op. cit.*, p. 2.

4. Claims based on fact, for instance, will not lie against the Crown. A complete list of the cases in which petitions of right will or will not lie will be found in Robertson, *op. cit.*, pp. 330-363.

5. See Robertson, *op. cit.* 331.

or its head by ordinary writ.<sup>6</sup> The tendency of modern English legislation, unlike that of Ontario, is to lessen the number of cases in which it is necessary to obtain a fiat and employ the prerogative remedy, and to widen the subject's right to bring an ordinary action.<sup>7</sup> But I know of no English instance, in modern or ancient times, in which a statute has purported to prevent a subject from proceeding against a body of commissioners engaged in commercial and competitive operations, and who, in no real sense of the phrase, represent the Crown, unless he first obtains the fiat of the Attorney-General—indeed, as I have already said, the necessity for obtaining the fiat of the Crown or of the Attorney-General has never been imposed in England by statute, except in the one very special, and now irrelevant, case of the Charities Procedure Act, 1812.

I will now examine the manner in which the Attorney-General for Ontario has exercised his powers of granting or refusing the fiat under the Power Commission Acts of 1906 and 1907. Here the departure from English law and practice is even more noteworthy.

In actions of the Attorney-General with a relator the fiat is never refused if any possible cause of action, of a nature suitable to proceedings of this description, is shewn by the statement of claim. There have been rare cases where the defendants have presented a memorial against the granting of authority by the Attorney-General, and the latter has heard the relator and the defendant before granting it,<sup>8</sup> but this has never been done in the case of a petition of right.

In the case of a petition of right, it is the Attorney-General's constitutional duty to advise the King to grant his fiat where there is any sort of substance in the claim, and if it is not such a claim as cannot possibly succeed against the King. It is not "competent to the King, or rather to his responsible advisers, to

6. These cases are enumerated in Robertson, op. cit., pp. 21-108.

7. Compare *Graham v. His Majesty's Commissioners of Public Works & Buildings* [1901] 2 K.B. 781, per Phillimore, J. The actual decision in this case is open to grave criticism, but this fact does not affect the observations to which I refer.

8. E.g., *Attorney-General v. Halifax Corporation* (1871) L.R. 12 Eq. 262. Here the defendants raised the question whether or not there was a public nuisance. If there was not, a relator action was not the proper form of proceeding. The Attorney-General did not try the merits of the case in any sense of the word, and granted his fiat. Where the defendants subsequently applied again to him, and in his opinion were endeavouring to get him to release the case, he refused to listen to him.

refuse applications to put into a due course of investigation any proper question raised on a petition of right."<sup>9</sup> "Everybody knows that the fiat is granted as a matter, I will not say, of right, but as a matter of invariable grace by the Crown wherever there is a shadow of claim; nay, more, it is the constitutional duty of the Attorney-General not to advise a refusal of the fiat unless the claim is frivolous. Therefore, in this particular instance, where there is a bona fide case to be tried, there was not a shadow of reason for pretending from the first that there was the least danger that the fiat would not be granted."<sup>10</sup> These opinions put the matter rather strongly, and from long personal experience of the matter, I can say from my own knowledge, that the fiat is never refused except in the case of claims which are clearly absurd, and that, even where the Attorney-General is convinced that the claim will fail, the fiat is not seldom granted in order that the suppliant may have the opportunity of satisfying himself by obtaining a judgment of the court.<sup>11</sup>

The practice of the Attorney-General for Ontario has been very different. If he had followed the English rule, and this, it is submitted, is obviously the reasonable one, he would have perused the statements of claim in the actions for which his fiat was sought, and if he had found any reasonable cause of action, whatever his opinion might have been as to its ultimate success, he would have granted his fiat without more; if he had found none, he would have refused it. This would have been the rational and constitutional course, and if he or his government were anxious to avoid difficulties and the possibility of injustice, as it must be assumed that they were, they would have thus avoided them. But, instead of pursuing this course, in the four cases which are before me, namely, the cases of *Murray, Felker, Smith and Beardmore*, the Attorney-General (in one case the acting Attorney-General), purported to erect himself into a sort

9. *Rygoes v. Duke of Wellington* (1846) 9 Beav. 579, at p. 600, per Lord Langdale, M.R.

10. *R. v. Commissioners of Inland Revenue, In re Nattan* (1884) 12 Q.B.D. 461, at p. 479, per Bowen, L.J. The remarks of Lord Justice Bowen, afterwards Lord Bowen, on this subject are of special value, as he was junior counsel to the Treasury, before he was raised to the Bench, and as such had, in accordance with the ordinary practice, to report to the Attorney-General whether he should advise the Crown to grant or refuse the fiat to such petitions of right as were presented.

11. Instances of this will be found in Robertson, op. cit., p. 379. See also *Harris's case*, a claim on the borderline between contract and tort, where the fiat was granted, discussed. *Ibid.*, p. 341.

of little court for the preliminary trial of the actions, and, after hearing counsel on both sides, decided, in his wisdom, that the plaintiffs would not succeed in their claims if he allowed them to go on, and in each case issued, in the form of a report, which I can only describe as a farcical document, his reasons for refusing his fiat. In England the Attorney-General exercises certain semi-judicial functions in connection with patents for inventions, but even there he is not to be regarded as holding a court. "At common law, the Attorney-General is, when he is exercising his functions as an officer of the Crown, in no case that I know of, a court in the ordinary sense."<sup>12</sup> The Attorney-General for Ontario, however, has constituted himself not only a court, but a court which arrogates to itself the right to hear and determine questions of law and fact, and to supersede the ordinary courts. In his report on the cases of *Smith* and *Beardmore*, moreover, the acting Attorney-General goes so far as to decide the matter on his personal knowledge of what the legislature meant and not on what it said; a quite novel and unprecedented method of interpreting a statute;<sup>13</sup> in another (*Murray's* case) the Attorney-General cheerfully disposes of the very difficult question as to the nature and limits of the Ontario Power Co.'s powers; in the fourth (*Felker's* case) he delivers a regular judgment of a sort on the Power Commission's alleged right to take easements. If there is any common law precedent for this kind of performance on the part of the Attorney-General, I shall be glad to know of it. In my opinion, it is quite impossible to find any justification for such proceedings in the law of England.

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Temple, LONDON, E.C., Eng.

12. *In re Van Gelder's Patent* (1888) 6 Rep. Pat. Cas. 22; sub. nom. *R. v. Attorney-General*, 4 Times L.R. 488, per Bowen, L.J. See also *R. v. Comptroller-General of Patents, Designs and Trade Marks* [1899] 1 Q.B. 909, per A. L. Smith, L.J. Lord Justice A. L. Smith, afterwards M.R., also occupied at one time the position of junior counsel to the Treasury, and, therefore, like Lord Bowen, had special knowledge of the matters now under discussion.

13. See *Salomon v. Salomon*, [1897] A.C. 22, at p. 38, per Lord Watson.

**DIVORCE IN QUEBEC.**

*To the Editor, CANADA LAW JOURNAL:*

DEAR SIR,—Ten or twelve days ago I cut the following extract from the Montreal *Daily Witness*, of 7th instant:—

"Mr. Justice Bruneau has just rendered judgment annulling the marriage of George Normandin with Emma F. Williams. The action was taken by Normandin on the ground that the marriage ceremony not having taken place before a competent official and with the required conditions, it was null and void, and should be declared so by the court. He alleged that being a Roman Catholic and Emma F. Williams belonging to another faith, the Protestant minister, the Rev. T. Walker Malcolm, who married them at Detroit, was not a competent officer to perform the ceremony, and, moreover, there was no publication of the banns, although no dispensation was obtained, and consequently the marriage was not public. A decree of Archbishop Bruchesi, dated October 21 last, annulling the marriage, for the reasons above mentioned, was also produced.

"Emma Williams did not plead to the action, and the court granted the civil annulment of the marriage as asked by Normandin."

If I understand the language of the paragraph, a Quebec judge has undertaken to declare null and void a marriage celebrated in the United States on grounds that would not be recognized under the law of any State in the Union, and that would not be recognized in any province of Canada, outside of Quebec.

The whole performance, if correctly reported, seems to me a travesty on marriage and divorce, and less defensible than the loosest divorce proceedings in the divorce courts of the neighbouring republic.

Yours truly,

S. A. CHESLEY.

LUNENBURG, N.S., Jan. 22, 1910.

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**REPORTS AND NOTES OF CASES.**


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**Dominion of Canada.**


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**SUPREME COURT.**


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**Board of Railway Commissioners.]** [Dec. 13, 1909.

**IN RE ORDER NO. 7473 OF THE BOARD OF RAILWAY COMMISSIONERS OF CANADA RESPECTING FENCING AND CATTLE-GUARDS.**

*Railways—Fencing—Uninclosed lands—Jurisdiction of Board of Railway Commissioners—Construction of statute—The Railway Act, R.S.C. 1906, c. 37, ss. 30, 254.*

Under the provisions of the Railway Act the Board of Railway Commissioners for Canada does not possess authority to make a general order requiring all railways subject to its jurisdiction to erect and maintain fences on the sides of their railway lines where they pass through lands which are not inclosed and either settled or improved; it can do so only after the special circumstances in respect to some defined locality have been investigated and the necessity of such fencing in that locality determined according to the exigencies of each case.

The order appealed from was varied, DUFF, J., dissenting.

Appeal allowed in part.

Present:—Sir Charles Fitzpatrick, C.J., and Girouard, Davies, Idington, Duff and Anglin, JJ.

*Chrysler, K.C., for the Canadian Northern Railway Co.*  
*Ford, K.C., supported the order.*

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**Quebec.]** **LARIN v. LAPOINTE.** [Dec. 24, 1909.

*Appeal—Quo warranto—Action by ratepayer—Municipal corporation—Payment of money—Statutory procedure—Matter of form—Montreal City Charter, ss. 42, 334, 338—3 Edw. VII. c. 62, ss. 6, 27.*

An action by a ratepayer of the city of Montreal to compel the members of the finance committee of the city council to reim-

burse the city for moneys which it was alleged they authorized to be illegally expended and asking for their disqualification under s. 338 of the City Charter is not a proceeding in quo warranto under the provisions of articles 987 et seq. of the Code of Civil Procedure.

By s. 334 of the charter (3 Edw. VII. c. 62, s. 27), the city council of Montreal must at the end of each year appropriate the sums at its disposal from the revenues of the city for the services during the coming year, including a reserve of 5%, 2% of which is to provide for unforeseen expenses. By s. 42, as amended by 3 Edw. VII. c. 62, s. 6, the finance committee of the council must consider all recommendations involving the expenditure of money, unless an appropriation has been already voted. An item of unforeseen expenditure, namely, the payment of expenses of a delegation to France, came before the council and was passed and sent to the finance committee which directed the city treasurer to pay the amount.

*Held*, the CHIEF JUSTICE and GIROUARD, J., contra, that the reserve of the two per cent. for unforeseen expenses was not an appropriation of the amount so directed to be paid.

*Held*, also, the CHIEF JUSTICE and GIROUARD, J., dissenting, that under the provisions of the charter it is essential that every recommendation for the payment of money where there has been no appropriation for the payment must receive the consideration of the finance committee and its sanction or refusal to sanction such payment before final action thereon by the council. That such a payment without this formality, even though bonâ fide, and though, in fact, sanctioned by the finance committee after being finally dealt with by the council, and though the city was not prejudiced thereby, is an illegal expenditure and involves the consequences provided by s. 338 of the City Charter.

Appeal allowed with costs.

*Lafleur*, K.C., and *C. Rodier*, for appellant. *Atwater*, K.C., and *Ethier*, K.C., for respondent.

## Province of Ontario.

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### HIGH COURT OF JUSTICE.

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Divisional Court.] GORDON v. GOODWIN.

[Jan. 19.

*Landlord and tenant—Unsanitary condition of dwelling-house—Right of tenant to repudiate tenancy—Remedying defects—Findings of fact of trial judge—Reversal on appeal.*

Appeal by the defendant from the judgment of CLUTE, J., in favour of the plaintiff in an action for rent or damages for breach of covenant in lease.

The plaintiff was the owner of a house in Ottawa, which by an indenture of lease, dated the 1st February, 1909, she let furnished to the defendant for 6 months at a rental of \$125 per month in advance. The defendant covenanted to leave the premises in good repair; and the plaintiff, that the premises and property were "now in good and substantial repair."

In the negotiation for the letting the plaintiff told the defendant that the sewerage and plumbing in the house were in perfect order.

The defendant took possession, and about two weeks thereafter became ill; a bad smell had been noticed; and a plumber who was sent for reported that there were defects in the plumbing. The defendant left the house, deeming it in an unsanitary condition.

The plaintiff sued for \$1,000, and obtained a verdict for \$640.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL and LATCHFORD, JJ.

Travers Lewis, K.C., and J. W. Bain, K.C., for the defendant. G. F. Henderson, K.C., for the plaintiff.

RIDDELL, J.:—There is no doubt as to the law. Upon the letting of a furnished house there is an implied undertaking that the house is reasonably fit for habitation, and if from any cause this is not the case, the tenant is justified in repudiating the tenancy: *Wilson v. Finch-Hatton*, 2 Ex. D. 336. This is quite irrespective of any representation by the lessor; if the lessor makes a representation that the house is fit for habitation, etc., he is not relieved from the effect of such representation by the

fact that he honestly believed in the truth of his representation: *Chaisely v. Jones*, 53 J.P. 280. And the house must be so reasonably fit for habitation at the time of the beginning of the term, and the lessor has no right to be allowed after that time to put the house in the condition it should have been in. Of course, there is no need for the tenement answering every whim of a finical tenant; but common sense should be applied in determining whether it does fulfil the required conditions. This state of the law was present to the mind of the learned trial judge, and the whole question is one of fact.

My brother Clute at the trial found against the defendant; and it becomes now a matter for consideration whether his findings of fact can be supported.

In *Beal v. Michigan Central R.R. Co.*, 19 O.L.R. 502, and *Ryan v. McIntosh*, 20 O.L.R. 31, we recently considered the principles to be adopted upon an appeal from the findings of fact made by a trial judge.

Here it seems to me that my learned brother has failed to give what I consider due weight to the evidence of the condition of the house in general, and confined his attention to three physical defects—two of which he considers slight and trifling and remediable in a short time. The evidence is, to my mind, clear that the house was in an unsanitary condition; it probably, from the evidence, would have been unsanitary even if the two defects found by the learned trial judge had been remedied; while the third defect, viz., that in the cellar, which seems to be proved by satisfactory evidence, can, I venture to think, not fairly be described as "a very slight defect." Supposing, however, all the defects to be slight, the case for the plaintiff is not bettered; for, in the first place, it is not the extent of the defect which is material, but the result of such defect in producing an unsanitary condition; and, second, the plaintiff has not the right either herself to correct these defects now, after the beginning of the term, or to call upon the defendant himself to repair.

Much was made of the fact that it was not proved that the sickness resulted from the condition of the house. It is quite likely, in accordance with *Beal v. Michigan Central R.R. Co.*, and the cases there cited, that the defendant would have filed had he claimed damages from the plaintiff for causing the sickness; but it is not necessary to go that far—it is not necessary to prove that the condition of the house was such that it did cause sickness; it is abundantly sufficient to prove, as was done in this

case, that it might have such effect—that is (to repeat) that the house was unsanitary.

Appeal allowed with costs and action dismissed with costs.

Divisional Court.]

[Jan. 20.

FARMERS BANK v. BIG CITIES REALTY AND AGENCY CO.

*Summary judgment—Motion for—Affidavit in reply—Refusal to allow cross-examination on appeal—Case remitted to court below—County Courts Act, s. 54.*

On a motion for summary judgment, affidavits were filed by the defendants which, unanswered, would entitle them to a dismissal of the motion. But an affidavit was filed in reply by the solicitor for the plaintiffs, which counsel for the defendants asked leave to cross-examine on, but leave was refused.

Held, on appeal to the Divisional Court, the defendants should have had an opportunity of disproving, if they could, the statements in the last affidavit by cross-examination thereon. Rule 603 should be applied only with caution and in a perfectly plain case. Appeal allowed with costs in the cause to the defendants, and case remitted to the court below under s. 54 of the County Courts Act.

T. Hislop, for the defendants. W. H. Hunter, for the plaintiffs.

Clute, J., in Chambers.]

[Jan. 21.

REX v. TEASDALE.

*Liquor License Act—Conviction for second offence—Amendment of s. 72 after first conviction—Change in penalty for first offence—Effect of—Interpretation of statutes.*

Application by the defendant, on the return of a habeas corpus for his discharge from custody under a warrant of commitment pursuant to a conviction for a second offence against the Liquor License Act.

The prisoner was first convicted on the 28th July, 1908.

On the 13th April, 1909, s. 72 of the Act was amended by increasing the penalty for a first offence from not less than \$50 besides costs and not more than \$100 besides costs, to a sum of not less than \$100 besides costs and not more than \$200 besides costs. The punishment for a second offence (imprisonment for 4

months) was not changed by the amendment. The Act was not repealed, but the figures indicating the amount of the penalty were changed.

CLUTE, J.:—It cannot be supposed that the legislature intended by increasing the penalty to give a clear slate in all cases where a first conviction has been made. The second offence, which calls for imprisonment, is the offence of selling liquor without a license after a previous conviction. There was a previous conviction for an offence against the Act.

Having regard to the nature of the amendment and to the intendment of the statute, as enacted by s. 101, sub-s. 6, I am of opinion that the offence for which the prisoner was convicted was a second offence within the statute, notwithstanding the amendment. I am unable to give effect to the objection. See the Interpretation Act, 1907, s. 7, sub-s. 46(d).

*J. B. Mackenzie*, for the defendant. *E. Bayly*, K.C., for the Crown.

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Divisional Court.] *FINDLAY v. STEVENS.*

[Jan. 21.

*Building contract—Penalty for non-completion of work by certain day—Contractor delayed by default of other workmen—Work not commenced until after time for completion—New contract—Necessity for proof of damage by delay.*

A contractor agreed to pay by way of liquidated damages \$1 a day after a certain date until the completion of the work.

*Held*, if the contractor is so delayed by the default of the proprietor or his workmen that he is unable to begin his work till a date after the termination of the time fixed by the contract . . . his delay in the after-prosecution of the work is not to be visited by the imposition of the penalty of so much a day. There is, in effect, a new contract for the performance of the work at the contract price, but without any revival of the penalty clause. On delay in this after-prosecution of the work the contractor may be liable, but only on proof of damage sustained thereby. *Moore v. Hamilton*, 33 U.C.R. 279, 520; *Holme v. Guppy*, 3 M. & W. 387; *Dodd v. Charles* (1897), 1 K.B.

*H. E. Rose*, K.C., for the plaintiff. *S. F. Washington*, K.C., for the defendant.

## DIVISION COURT—ELGIN.

Ermatinger, J.J., Elgin Co.]

[Jan. 18.

TEADERS BANK *v.* CRAIG.*Bill and notes—Collateral notes—Lien.*

The plaintiffs on the strength of his note dated 30th March last for \$675 and a number of collateral notes amounting to \$900, advanced to Robert Craig the sum of \$650.65. Among the collaterals was the note sued upon, made by Wilfred Craig in favour of the defendant, Louis Craig, and by him endorsed and also assigned to the plaintiffs by a special endorsement consenting to extension of time, waiving protest, etc. All the other collaterals have been paid except \$5 unpaid on one. The advance of \$650.65 has thus been more than repaid. The plaintiffs however claim a lien on this note sued on for other moneys due them to more than the amount of this note in respect of over-drafts and advances made by them both prior and subsequent to the advance of \$650.65. I think upon the evidence the plaintiffs have undoubtedly a lien for the amount still due them upon Robert Craig's general account, and that, as I understand it, is more than the amount of this note. See *In re European Bank*, L.R. 8 Chy. 41.

It was contended that this lien was subject to any defence that defendant Louis Craig might have as against Robert Craig, and that as a matter of fact Robert Craig was, and his estate is, indebted to the defendant Louis Craig. By s. 54, sub-s. 2, of the Bills of Exchange Act (R.S.C., c. 119), the lienholder is "a holder for value to extent of the sum for which he has a lien." The plaintiffs are also holders in due course as defined by s. 56, having no knowledge of the state of accounts between defendant Louis and Robert Craig and having acquired the note while current. The note is a negotiable instrument within the ordinary law merchant and plaintiffs being holders in due course and for value, no defence as between defendant and Robert Craig merely can effect their claim, on which they are entitled to judgment for the full amount claimed (with costs) against Louis Craig, and for \$76.65 against the garnishees.

I have not considered the possible rights of said defendant as between him and Brown, the endorser of prior note of Robert Craig, in the event of the amount so covered herein and in the suit against Brown being more than sufficient to satisfy all liens

or claims of the plaintiffs, that is, as to who would be entitled to such surplus or whether any rights of contribution as between Louis Craig and Brown may or may not arise.

*A. E. Haines*, for plaintiffs. *W. Harold Barnum*, for defendant.

## Province of Nova Scotia.

### SUPREME COURT.

Russell, J.]

BALCOM v. HISELER.

[Feb. 1.

*Mines and minerals—Partnership in operation of gold mining areas—Accounting—Evidence—Entry in book—Suspicious circumstances—Estoppel.*

In an action for an accounting in connection with the acquisition, management and proceeds of certain gold mining areas, and the sale of mining machinery an entry made by defendant's book-keeper in defendant's ledger, shewed that the price charged to plaintiff for his share of the property was \$4,000. This entry, plaintiff swore, was made by the bookkeeper at the time by defendant's directions and the evidence was supported by the book-keeper and by an independent witness, the latter of whom gave evidence of an admission made to him by defendant. Defendant relied upon the instrument of transfer in which the amount was stated as \$10,000, and upon an entry made by defendant in his day book to the same effect. Plaintiff swore that the amount mentioned in the transfer was inserted at the instance of defendant for the reason that it would "look better" in the event of a sale, and there was a suspicious circumstance connected with the entry in the day book inasmuch as the entry was made in defendant's handwriting at the foot of a page and the next entry, at the top of the following page was of an earlier date.

*Held*, that the entry in the day book was not from any point of view evidence in defendant's favour, and could only be made use of, if at all, by way of qualifying the entry in the ledger, and must be disregarded inasmuch as under the evidence it seemed to have been made after the event for the purpose of bolstering up defendant's claim.

There was a verbal agreement for the transfer of a half

interest in another property, to be worked on the same terms. When plaintiff demanded a transfer defendant tendered one that was not considered satisfactory, and plaintiff had a form of transfer prepared which defendant refused to sign. Plaintiff left the province and subsequently his agent placed the original transfer on file in the Mines Office.

*Held*, that this was an acceptance of the transfer tendered by defendant, and plaintiff could not after that acceptance claim that he had no interest in the areas referred to, but must be regarded as an owner and entitled to an accounting with regard to the property from the time that work commenced.

After plaintiff's departure from the province defendant inquired of his agent whether plaintiff had left any money for the purpose of working the property and was informed that he had not and that any work that had to be done would be a matter for consideration.

*Held*, that defendant could not after this go on indefinitely making expenditures and charging them up to plaintiff and that the accounting must close with expenditures made up to the date of the interview.

*Power*, K.C., for plaintiff. *Harris*, K.C., and *Kenny*, for defendant.

Trial.—Drysdale, J.]

[Feb. 1.

BLACK v. TYRER ET AL.

*Sales—Contract for cargo of lumber—Failure to deliver according to specifications—Refusal to accept—Shipment on vessel subsequently lost—Receipt by master—Held not a waiver—Intermediary—Advances and commissions.*

Plaintiff contracted through the defendant T. with the defendants G. & W. for the supply to the latter of a cargo of lumber in specified quantities, of specified dimensions and in specified proportions. The contract called, among other things, for the supply of a quantity of spruce boards, of which not less than fifty per cent. were to be of certain size. The defendants G. & W., on receiving notice that not more than twenty-five per cent. of the spruce boards were of the required size, refused to accept delivery.

There were some negotiations with a view to inducing them to accept the cargo on new terms, and, while these were pending, the vessel chartered by defendants, upon which the cargo had

been loaded, proceeded to sea and was wrecked before reaching her destination.

*Held*, that the shipment made by plaintiff not being according to contract defendants were not bound to accept delivery.

Also, that the receipt of the goods by the master of the vessel, who was merely defendants' agent to receive the goods for the purpose of carriage, was not an acceptance as delivery under the terms of the contract.

Also, that plaintiff's claim could not be sustained as against the defendant T., he being shewn to be a mere intermediary.

Plaintiff claimed, in addition, for money supplied the master of the vessel, at defendant's request and for commission thereon.

*Held*, as to this, that he was entitled to recover.

*Harris, Henry & Co.* for plaintiff. *Murray & McKinnon*, for the defendant Tyrer. *McInnes, Mellish & Co.*, for the defendants G. & W.

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## Province of Manitoba.

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### COURT OF APPEAL.

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Full Court.]      *SHAW v. CITY OF WINNIPEG.*      [Jan. 17.

*Negligence—Liability of municipal corporation for negligence of employee of waterworks department—Agency of servant of corporation.*

A municipal corporation authorized by the legislature to establish and manage a system of waterworks, but not bound by law to do so, will, if it does so, be liable for injuries caused by the negligence of the servants employed by it therein while in the performance of their duties.

*Hesketh v. Toronto*, 25 A.R. 449, and *Garbutt v. Winnipeg*, 18 M.R. 345, followed.

It is actionable negligence if an employee of the waterworks department of a city, having opened the trap door in the floor of a kitchen for the purpose of reading the water meter in the basement, leaves the trap door open on going away, whereby an occupant of the house is injured by falling through the open trap door.

*Dennistoun, K.C.*, and *Young*, for plaintiff. *Hunt*, for defendants.

**KING'S BENCH.**

Macdonald, J.] IN RE BEDSON ESTATE. [Jan. 18.

*Statute of Limitations—Administration of estates—King's Bench Act—Manitoba Trustee Act.*

Application by the administrator of the estate for the advice and direction of a judge under s. 42 of the Manitoba Trustee Act, R.S.M. 1902, c. 10.

The intestate died in 1893 and the administrator in 1896 distributed amongst the creditors whose claims were proved and allowed by him the proceeds of all the assets of the estate of which he had any knowledge, such proceeds being only sufficient to pay the creditors a dividend of about 3.41 per cent.

In 1909 the administrator realized a further sum for the estate upon an asset then recently discovered.

There had been no payment on account or written acknowledgment of indebtedness made by the administrator to any creditor since 1896.

*Held*, notwithstanding sub-s. (a) of s. 39 of the King's Bench Act, R.S.M. 1902, c. 40, that the claims of the creditors were barred by the Statute of Limitations, that it would be the duty of the administrator to plead the statute in any action by a creditor and that the administrator should forthwith distribute the remaining funds of the estate amongst the next of kin. Costs to all parties out of the estate.

*Hough*, K.C., for the creditors. *Young*, for the next of kin.

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Mathers, J.] [Jan. 27.

CITY OF WINNIPEG *v.* WINNIPEG ELECTRIC RAILWAY Co.

*Injunction—Forfeiture—Waiver—Estoppel—Meaning of words “operation, conduct and management.”*

1. An agreement by the defendant railway company to place and keep within the city limits all their engines, machinery, power houses, etc., is not a term or condition relating to the "operation, conduct and management" of the street railway lines in the city; and, although the city may sue for and recover damages in consequence of the establishment and use of a hydro-electric power plant outside the city for operating its cars in the city, the company does not thereby forfeit its privileges and rights as to street

cars under a provision that, "insofar as the terms and conditions of the agreement relate to the operation, conduct and management of said railway lines or system or any part thereof, the same and the fulfilment of same shall be conditions precedent to the continued enjoyment" of such privileges and rights.

2. If the agreement had fully provided for such forfeiture, the city had waived it by passing by-laws fixing schedules for the running of the cars, by calling on the company to proceed at once with the construction and operation of new lines, which were accordingly built and subsequently operated at great expense to the company, and by accepting five per cent. of the gross earnings of the company payable under the agreement and aggregating about \$100,000, all these things having been done after the city had full knowledge of the alleged breach of the agreement.

3. The alternating current brought into the city from the power plant at Lac du Bonnet is used to drive electric generators at the Mill Street Station in the city and these develop the direct current used in propelling the cars. This direct current is power produced in the city and the company has the right to use it to operate its street cars without the consent of the city and to erect poles and wires for that purpose, but not for any other purpose.

4. The defendants had acquired the right to develop electric energy outside the city and to distribute it in the city through poles and wires, but only with the consent of the city; and, as that consent had never been given or applied for, an injunction should be issued to prevent the defendants from erecting poles or wires on the streets, lanes or highways of the city for the transmission of electric current developed outside the city limits for the purposes of electric lighting or commercial power, and requiring the removal of any poles and wires so erected.

5. The issue by the city engineer of a permit for the erection of the poles and wires objected to was not intended to authorize the use of them for electric power, and the engineer had no authority to give any permit that would obviate the necessity of the consent of the city being obtained.

6. The city was not estopped from applying for the injunction by having taken and paid for power transmitted over such poles and wires from the plant outside the city without its consent and against its protest.

*Wilson, K.C., and Robson, K.C., for plaintiffs. Munson, K.C., and Laird, for defendants.*

## Book Reviews.

*The Canadian Annual Digest, 1909.* Toronto: Canada Law Book Company, Limited.

This useful work, which is already in the hands of the profession, is a digest of all the cases reported in the official reports of the various courts of the Dominion including the Supreme and Exchequer Courts of Canada and the Canadian cases decided by the Privy Council during the year. It contains also a digest of cases selected from the Canadian Criminal Cases, the Canadian Railway Cases, and the Canada Law Journal.

The volume just issued maintains the high level of the series, logical in its divisions and arrangement, and accurate in its references. It is sure to find a place on the desk of every lawyer who pretends to be up to date.

*A Treatise on Crimes and Misdemeanours.* By SIR WILLIAM O. RUSSELL, late Chief Justice of Bengal. Seventh English edition. By W. FEILDEN CRAIES and LEONARD W. KERSHAW, both of the Inner Temple, Barristers-at-law. 3 vols. London: Stevens & Sons, Limited, and Sweet & Maxwell, Limited. Canadian Notes by the HON. A. B. MORINE, K.C. Toronto: Canada Law Book Company, Limited.

Among all the admirable books for lawyers which have been given to us by London publishers, "Russell on Crimes" deservedly holds a high place, and this new edition will establish its reputation more firmly than ever as the leading work on criminal law and practice. One of the defects of earlier editions has been its faulty arrangement. Thus, criminal libel and bigamy, as well as conspiracy and perjury, were treated with numerous other miscellaneous subjects under "Offences affecting the Government."

The outstanding feature of this new edition of "Russell on Crimes" is the rearrangement of the material of the old work in harmony with modern ideas. The new arrangement, which is logical and scientific, follows the main line of Stephens' Draft Code, and in the result we have now practically a new "Russell on Crimes," which is a distinct advance on all former editions.

The Canadian notes, which have been compiled in a pains-taking and thorough manner by the Hon. A. B. Morine, K.C., have been added at the end of each chapter, and in its appropri-

ate place will be found the relevant statutory enactments and decisions of the Canadian courts in all the provinces. Each note is given a heading which indicates the special subject-matter with which it deals. It is not too much to say that this edition will supersede all earlier ones, and will be found indispensable to every practitioner in the criminal courts.

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*Canadian Patent Office Practice.* Definitions for guidance in preparing and prosecuting applications and other proceedings relating to patents. By W. J. LYNCH, Chief Clerk of the Canadian Patent Office, Ottawa. 1909.

This very useful little handbook has been prepared by one to whom long years of experience have given an intimate knowledge and insight into the peculiarities arising from applications for patents and of the stumbling-blocks met with in obtaining a patent. The work has been compiled more particularly for the use of the profession, but is useful for all having business with the Patent Office. The text of the Act is given in full, with annotations, in order to make clear those points on which it has been found in practice that misconceptions and consequent errors have arisen, causing trouble and sometimes failure. Under one cover are found the law, rules, forms and practice. The author, who is his own publisher, may be congratulated on the book being neatly got up, while the printing and typography are all that could be desired.

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*Leading Cases in Equity.* By J. ANDREW STRAHAN, M.A., LL.B., Barrister-at-law. London: Butterworth & Co. 1909.

This little book is intended to introduce students to the study of the law reports, by shewing them, as simply as possible, how the principles they are learning have been applied by distinguished lawyers to actual facts. The editor seems to have made an excellent selection of cases.

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*The Principles of the General Law of Mortgages.* By J. ANDREW STRAHAN, M.A., LL.B., Barrister-at-law. London: Butterworth & Co.

This little work aims at shewing that the law of mortgages is based on sensible general principles which the very common law judges, who denounce it, apply without scruple to ordinary contracts which involve penalties. It is a very interesting and helpful book for students.

## Bench and Bar.

### HAMILTON LAW ASSOCIATION.

The Annual Meeting of the Hamilton Law Association was held January 11th, 1910, in the Law Library.

The trustees presented their Thirtieth Annual Report. The membership of the Association is 70. There are 4,674 volumes in the library, 103 having been added during the year.

The trustees expressed their regret at the deaths of two former members, H. H. Bicknell and James Dickson.

In response to a letter from the Secretary of the Statutes Revision Commission, the proposed revision of the Devolution of Estates Act was referred to the Legislation Committee, whose suggestions were forwarded to the Secretary.

At the meeting it was unanimously resolved, that in the opinion of the members of this Association, there should be an increase of fees provided for in cases when what were formerly High Court cases are now tried in the County Courts, and also that there should be an increase in the Surrogate Court fees, and fees for succession duty papers provided for.

The following officers were elected for 1910:—

President, Mr. S. F. Lazier, K.C.; Vice-President, Mr. Wm. Bell, K.C.; Treasurer, Mr. Chas. Lemon; Secretary, Mr. W. T. Evans; Trustees, Messrs. Geo. Lynch-Staunton, K.C., S. F. Washington, K.C., T. C. Haslett, K.C., E. D. Cahill, W. A. Logie.

### JUDICIAL APPOINTMENTS.

John Donald Swanson, of Kamloops, Province of British Columbia, Barrister-at-law, to be judge of the County Court of Yale, in the said province, vice His Honour Judge Spinks, resigned. (Jan. 24.)

His Honour Judge Donald Swanson, judge of the County Court of Yale, Province of British Columbia, to be a local judge of the Supreme Court of British Columbia.

# Canada Law Journal.

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## THE PRINCIPLES OF ARGUMENT.\*

Mr. Bell's work is described in his preface as "designed not only for students in schools and colleges as an educational discipline and a guide for the practice of debate, but also, and especially, for young men who have left school, for law students, lawyers, journalists and others who are daily engaged in the practice of argumentation." The author has admirably accomplished the end that he has in view. His work may be well described as an application of logical principles to the treatment of legal argument and as such is a work that should be read by every student of law. But it is much more than a student's manual. Starting with the principle that while "inference is the business of the investigator, argument is the business of the advocate," he bears in mind throughout this whole work the practical and resultant value to the advocate of the logical application of facts. He proceeds upon the sound logical basis laid down by Mr. Sidgwick, that "proof for all practical purposes essentially consists, not in demonstration, but in successful resistance to attack; not in complete establishment beyond all doubt, but establishment on a sound basis in the face of hostile criticism, by means of those tests which are in our power to apply." His principles are illustrated by such apposite and interesting illustrations of reasoning, taken from newspapers, magazines, speeches and law reports, that the reader will find his attention attracted and held by the illustration apart altogether from the logical principle that is applied. The two chapters on "Arguments from Circumstantial Evidence" and on "Refutation" will repay any lawyer for reading them. There is plenty of suggestive food for thought in this exceedingly able and sound application of logical principles to the business of the advocate. It is a very creditable performance.

H. H. DEWART.

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\**Principles of Argument.* By Edwin Bell, LL.B. Toronto: Canada Law Book Company, Limited. 1910.

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*A DISTINGUISHED GERMAN JURIST.*

Heinrich Brunner, professor of law in the University of Berlin, will celebrate on June 21, 1910, his seventieth birthday. A committee of prominent German jurists has been formed to assure due recognition, on this anniversary, of Brunner's achievements as teacher and as writer. It is proposed to publish, as is customary on such occasions, a volume of essays prepared in his honour by his colleagues and former pupils, and also to raise a fund for a permanent memorial. In view of the fact that Brunner's researches in early German law and in the law of the Frank Empire have direct bearing upon the legal history of all the West-European states, including England, and that the results attained by him have been of the greatest value to French, Italian and English legal historians, it has seemed proper to give to the lawyers and historical students of all these countries and of the United States an opportunity to contribute to the memorial fund.

All American lawyers and historians who are familiar with the development of legal history during the last forty years are aware that Brunner, in his monumental "History of German Law," has cleared up many important and previously obscure points in Anglo-Saxon and in Anglo-Norman law, and that before the appearance of this work he had shewn, in a now famous little book, the origin of the English jury system. No reader of Maitland or of Thayer or of Ames is ignorant of the debt which English legal history owes to Brunner. It is hoped that American lawyers and other Americans who are interested in legal history will largely embrace this opportunity to do honour, during his life, to one of the most eminent of living scholars. Since the value of the testimonial will depend far more on the number of subscribers than on the amount of their subscriptions, it is hoped that no one who wishes to contribute will hesitate to send a small sum. By direction of the German committee, American contributions are to be sent to Professor Munroe Smith, Columbia University, New York City.

**A FICTION OF LAW.**

In giving judgment in the recent case of *Rex v. Dibdin*, in which the effect of the Imperial statute of 1907 allowing marriage with a deceased wife's sister was in question, Lord Justice Farwell remarks: "It is to my mind so repulsive as to be inconceivable that the King, by and with the advice of the Lords Spiritual and Temporal and Commons, should have continued the declaration that such marriages are contrary to God's law as incestuous, and yet should have legalized them as regards clergy and laity alike, and authorized their solemnization in church to the desecration of the House of God." If the Act in question had in fact been passed "with the advice and consent of the Lords Spiritual," that fact certainly would well warrant the learned judge's opinion, but inasmuch as a matter of fact the Act was passed against the advice and without the consent of a single bishop, and on the contrary in direct opposition to the votes of the Archbishop of Canterbury and ten other bishops present, it is a mere fiction of law to describe it as being enacted "with the advice and consent of the Lords Spiritual." In the interests of truth would it not be better that even Acts of Parliament should not be made to bear on their face what is nothing less than a falsehood?

**REVIEW OF CURRENT ENGLISH CASES.**

(Registered in accordance with the Copyright Act.)

**EMPLOYER AND WORKMAN—COMPENSATION—ACCIDENT—REFUSAL OF WORKMAN TO SUBMIT TO SURGICAL OPERATION.**

In *Marshall v. Orient Steam Navigation Co.* (1910) 1 K.B. 79, the question again arose in a workman's compensation case as to the effect of the workman having refused to submit to a surgical operation on his right to compensation. In this case the plaintiff was a sailor, and in the course of his employment had injured his finger. The ship's doctor proposed a slight surgical operation, which the plaintiff refused to submit to, and the plaintiff's finger had subsequently to be amputated. The evidence was conflicting as to whether the proposed operation would have saved the finger. In these circumstances the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.J.J.) held that the employers had failed to discharge the onus of shewing that the loss of the finger was due to the refusal to undergo the operation; and therefore that the plaintiff, notwithstanding his refusal to submit to it, was entitled to compensation.

**SOLICITOR AND CLIENT—VERBAL AGREEMENT AS TO COSTS—NO COSTS PAYABLE BY CLIENT—RIGHT TO RECOVER COSTS FROM OPPOSITE PARTY—ATTORNEYS' & SOLICITORS' ACT, 1870 (33-34 VICT. c. 28), ss. 4, 5—(9 EDW. VII. c. 28, ss. 24, 28).**

In *Gundry v. Sainsbury* (1910) 1 K.B. 99, the plaintiff recovered damages against a defendant for injuries sustained by being bitten by the defendant's dog. It appeared that the plaintiff had made a verbal agreement with his solicitor that he was not to be liable to him for any costs; the County Court judge who tried the action therefore refused to give the plaintiff any costs. The Divisional Court (Darling and Bucknill, JJ.) held that the County Court judge was right, and that it made no difference that the agreement was verbal and not in writing as provided by 33-34 Vict. c. 28, s. 4; (see 9 Edw. VII. c. 28, ss. 24, 28).

## Correspondence.

### **GETTING MONEY OUT OF COURT.**

*To the Editor, CANADA LAW JOURNAL:*

SIR,—The incident referred to on p. 44 in regard to the old Court of Chancery is incorrectly stated. The money in question was not money in court, but money of the Law Society which had been received by the secretary in payment of solicitors' fees too late to bank, it was placed in the vault of one of the officials of the court, the key of which was handed to the secretary of the Law Society; but the money was not in any sense in court or in the custody of the court. The secretary was an elderly and infirm gentleman living in the east wing, and after placing the money in the vault could not have had access thereto, and was a man above all suspicion. On the following morning my recollection is that the door of the vault was found to be shut, but the window, including the iron shutter, which had been fastened from the interior were found to be open, and the money gone, but it was never proved, as far as I ever heard, who took it.

**AN OLD STAGER.**

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REPORTS AND NOTES OF CASES.

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**Dominion of Canada.**

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**SUPREME COURT.**

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Board of Railway Commissioners.]

[Feb. 15.

G.T.R. Co. v. DEPARTMENT OF AGRICULTURE.

*Appeal—Limitation of time—Railway Commissioners—Question of jurisdiction—Leave of judge—Powers of Board—Completed railway—Order to provide station—R.S. (1906) c. 37, ss. 26, 151, 158-9, 166-7 and 258.*

Except in the case mentioned in rule 59 there is no limitation of the time within which a judge of the Supreme Court may grant leave to appeal under s. 56(2) of the Railway Act on a question of the jurisdiction of the Board of Railway Commissioners.

The Board of Railway Commissioners has power to order a railway company whose line is completed and in operation to provide a new station at any place where it is required to afford proper accommodation for the traffic on the road.

Appeal dismissed with costs.

*Chrysler, for appellant. Lancaster, K.C., for respondent.*

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Ont.]

[Feb. 15.

ALEXANDER BROWN MILLING Co. v. CANADIAN PACIFIC RY. Co.

*Lessor and lessee—Covenant to renew—Severance of term—Consent of lessor—Enforcement of covenant—Expropriation.*

A lease of water lots in Toronto contained a covenant by which the lessees at the expiration of the term, on conforming to the conditions and giving notice to the lessors, would be entitled to a renewal or payment for their improvements at the option of the latter. Part of the leasehold premises were sold by the lessees to the C.P. Ry. Co. and the balance became vested in the appellants who gave the required notice for renewal as to their portion and remained in possession for some time after the

lease expired with no intimation from the lessors that it would be refused. The C.P. Ry. Co. proceeded to expropriate a further strip of the leased lands and an action was brought to determine the right of the appellants to compensation on the basis of the term being renewed.

*Held*, affirming the judgment of the Court of Appeal for Ontario, 18 Ont. L.R. 85, that the covenant for renewal could only be enforced for the whole of the lands and not for the part held by appellants.

*Held*, also, that though the lessors by consenting to the assignment to the C.P. Ry. Co. had recognized the existence of some right of renewal which was also assigned, it was not the right to renew for a part only. The appellants, therefore, were not entitled to the compensation claimed. Appeal dismissed with costs.

*Shepley*, K.C., and *Miller*, for appellants. *Armour*, K.C., and *MacMurphy*, K.C., for respondents.

## Province of Ontario.

### COURT OF APPEAL.

[Dec. 31, 1909.]

RE LAKE ONTARIO NAVIGATION CO.

DAVIS'S CASE.

HUTCHINSON'S CASE.

*Company*—*Winding-up*—*Contributory*—*Shares*—*Allotment*—  
*Right to repudiate*—*Voting on shares*—*Director*—*Misfeasance*.

Appeals by Davis and Hutchinson from the order of TEETZEL, J., 18 O.L.R. 354.

The appeals were heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN and MEREDITH, J.J.A.

*F. J. Dunbar*, for Davis. *I. F. Hellmuth*, K.C., for Hutchinson. *M. C. Cameron*, for the liquidator. *J. H. Moss*, K.C., for shareholders.

*Meredith*, J.A.:—The appellant Davis applied, in writing, for 130 shares at the price of \$1,300. The whole testimony—to which credit has been given and which is not now questioned—

makes it very plain that the full price of that which this appellant was to get was \$1,300.

The moment he became aware of that fact, he stopped the cheque he had given for the \$1,300—the full amount of the purchase money; and refused to have anything more to do with the matter.

In the meantime he had given a proxy to vote upon the shares which he had applied for; and that proxy was acted upon; but there was no sort of acceptance of the stock actually allotted, nor any sort of intention to accept it; instead, there was the promptest rejection of the shares which were allotted.

In these circumstances, it would be extraordinary if the appellant were in law liable for the \$13,000—liable to pay for something he never applied for, never bought, nor ever accepted.

It is not a case of buying the ordinary stock of the company under some mistake of law, or of fact, on the part of the purchaser, as to the legal effect of becoming such a purchaser.

I know of no difference in principle between a sale of personal property of this character and that of any other. There must be an actual sale; if one bargain for one thing, he cannot be compelled to accept another.

In this case the appellant applied for one thing and was offered another, which he promptly rejected. Authorizing his proxies to vote upon the stock which he was to get—not that which was allotted—was in no sense an acceptance of that which was offered in lieu of that which was sought; nor could it have any legal effect, conferring no legal power to vote.

*Ex p. Sandys*, 42 Ch. D. 98, is not an authority to the contrary; indeed, in that case it was held that there was no liability under the original contract, but it was held that subsequent conduct evidenced a subsequent contract to take the stock as allotted.

I would allow the appeal.

In Hutchinson's case there can be no liability if there be none in Davis's case. Davis should, and must, eventually have had the money returned to him if it had been actually paid over to, and been retained by, the company; so that any intervention by Hutchinson caused no loss or injury to the company.

Moss, C.J.O., OSLER, GARROW and MACLAREN, JJ.A., concurred; MACLAREN, J.A., stating reasons in writing.

REX v. ELLIS.

[Dec. 31, 1909.]

*Criminal law—Vagrancy—Criminal Code, s. 238(1)—Gaming—Betting.*

Case stated by one of the police magistrates for the city of Toronto.

The defendant was charged with vagrancy. He pleaded "not guilty," but counsel on his behalf admitted that he took personal bets on horse races with different individuals in the streets of Toronto, having no fixed place for taking the bets or paying them; that the defendant made his living for the most part thereby, having no other business; that he took these bets with individuals in his own behalf, and, if he lost, he himself paid. The magistrate convicted, but reserved the question whether, upon the admissions, the defendant could be convicted as a vagrant under s. 238(1) of the Criminal Code: "Every one is a loose, idle or disorderly person or vagrant who,— . . . (1) having no peaceable profession or calling to maintain himself by, for the most part supports himself by gaming or crime, or by the avails of prostitution."

The case was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN and MEREDITH, J.J.A.

T. C. ROBINETTE, K.C., for the defendant. E. Bayly, K.C., for the Crown.

MEREDITH, J.A.:—The conviction cannot be sustained. The charge against the accused was vagrancy, in "having no peaceable profession or calling to maintain himself by, but, for the most part," supporting "himself by gaming . . ."

The conviction is based entirely upon the admission of the accused, that he made his living, for the most part, by betting on horse races. There was no sort of admission, or evidence, of "gaming."

Gaming and betting on horse races are different things; and the difference between them, under the Criminal Code, is marked, as ss. 226 and 227 shew: the one is aimed against gaming, the other against betting, in the manner dealt with in them; and all of the provisions of the Criminal Code, touching the subject, indicate the intention of Parliament to steer clear of making mere betting a crime: see s. 235 especially.

Having regard to the language employed in the sections of the Act to which I have referred, as well as to s. 238, it seems plain to me that, if it had been intended to make such things as the accused admitted he had done a crime such as he was accused

of, the vagrancy section of the Criminal Code, in the part from which I have quoted, would have, in conformity to other sections I have referred to, have had added to it the words "or betting" after the word "gaming." If this were not so, there would have been a great waste of energy in "barking up the wrong tree" in such cases as *Saunders v. The King*, 38 S.C.R. 382.

I would answer the question in the negative and direct that the accused be discharged.

OSLER, J.A., agreed, for reasons to be stated in writing.

Moss, C.J.O., GARROW and MACLAREN, JJ.A., also concurred.

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#### KIMBALL v. BUTLER.

*Master and servant—Injury to and consequent death of servant  
—Negligence—Servant not acting in course of duty—Voluntary incurring of risk—No duty owing by master—Contributory negligence.*

Appeal by the plaintiff from the order of a Divisional Court, dismissing an appeal by the plaintiff from the judgment of TEETZEL, J., at the trial, dismissing the action, which was brought by the widow of Wallace Kimball, deceased, to recover damages for the death of her husband while in the employment of the defendants, under circumstances of alleged negligence on the part of the defendants.

The work upon which the deceased was employed at the time of his death was that of constructing a tunnel under the Detroit river, and, being a civil engineer, his position was that of superintendent of shaft No. 2.

On the night of the 14th September, 1908, a fire occurred in shaft No. 4 which, it was supposed, was caused by the use of candles in the hands of some of the defendants' workmen engaged in making repairs to a bulkhead containing compressed air, which was leaking. The place where the fire occurred was about 2,000 feet distant from shaft No. 2, where the deceased was employed, and was territorially quite beyond any place in the tunnel where his duty to the defendants required him to be.

At the time of the fire there were workmen in the tunnel, and the deceased, attracted to shaft No. 2 by the fire, went, with others, down that shaft for the purpose of assisting to extinguish the fire and in the rescue of the workmen in the tunnel; and, while in the tunnel, was suffocated by the smoke, which

was very dense, although the fire itself was not otherwise of a serious nature.

Negligence was charged by the statement of claim in not providing and maintaining proper supervision of the work, in leaving timber or paper exposed, in permitting the improper use of fire, and otherwise conducting the work in a negligent manner, negligence in the person having superintendence, absence of proper appliances to put out fires, and insufficient modes of egress from the shaft in which the fire occurred.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A.

*J. H. Coburn*, for the plaintiff. *J. H. Rodd* and *E. C. Kenning*, for the defendants.

GARROW, J.A. (after setting out the facts as above) :—It is perfectly plain . . . that in doing as he did the unfortunate deceased was acting not at all as the servant of the defendants, or under any orders or commands, directly or indirectly, from them, but solely as a volunteer. And it is also equally beyond question that in venturing into the shaft for the second time as he did, he did so with a full comprehension of the danger of so doing, and, indeed, after a warning not to do so from Mr. Wheeler, who was acting as the defendants' first aid physician. In such circumstances, and in view of the reservation made by consent at the trial that the court might deal with the issue of contributory negligence upon the evidence, the case for the plaintiff, notwithstanding the above and earnest argument of Mr. Coburn, seems upon both grounds absolutely hopeless.

Appeal dismissed.

MEREDITH, J.A., agreed in the result, for reasons stated in writing.

OSLER, J.A., agreed, for reasons to be stated.

MOSS, C.J.O., and MACLAREN, J.A., also concurred.

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#### HIGH COURT OF JUSTICE.

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Master in Chambers.]

[Jan. 15.

GREAT WEST LIFE ASSURANCE CO. v. SHIELDS.

*Summary judgment—Affidavit in support of motion.*

Motion by the plaintiffs for summary judgment under Rule 603 in an action on a judgment recovered in Manitoba. The Master held that the affidavit in support of the motion, being

that of one of the Ontario solicitors for the plaintiffs, deposing to his information and belief derived from letters and telegrams received from the plaintiffs' Manitoba solicitors, was insufficient: *Lagos v. Grunwaldt* (1910) 1 K.B. 41; *In re J. L. Young* (1900) 2 Ch. 753. This affidavit was fortified by an affidavit of one of the Manitoba solicitors, but that, too, was deemed insufficient, as no reasons were given for the belief that nothing had been paid on the judgment and that there was no defence to the action. Motion dismissed with costs to the defendant in the cause.

*J. D. Falconbridge*, for the plaintiffs. *M. Lockhart Gordon*, for the defendant.

Boyd, C.]

[Jan. 17.

*MACDONALD v. WALKERTON AND LUCKNOW R.W. Co.*

*Contract—Railway construction—Unpacked frog—Compensation to family of person killed—Default of contractor—Indemnity.*

Action to recover \$5,655.45, balance alleged to be due on a contract to build a railway for the defendants. The defendants set up that under the contract it was the duty of the plaintiff to fill with standard wooden blocks the narrow places between rails at switches, etc., and that, owing to the plaintiff's neglect to perform his duty, one Clarke, a conductor of a train of the defendants, had his foot caught in an unpacked frog and was run over by a car and killed, whereby the defendants incurred legal liability to and paid Clarke's representatives \$5,250, which they claimed to deduct from the amount due to the plaintiff, and they brought \$405.45 into court, and asked to have the action dismissed. The Chancellor found that the proximate cause of the conductor's death was the absence of the packing required by the Railway Act, R.S.C. 1906, c. 37, s. 288, and by the contract; that the amount of compensation paid was such as should be accepted as fair and reasonable, and so binding on the contractor; that there was a sufficient supply of available material provided by the defendants to pack the dangerous gaps; and that the contract covered such a case of indemnity as was presented. Action dismissed with costs; money in court to be paid out to the plaintiff, unless the defendants seek to have it impounded to answer the costs.

*G. H. Kilmer*, K.C., and *J. A. McAndrew*, for the plaintiff. *I. F. Hellmuth*, K.C., and *G. A. Walker*, for the defendants.

Divisional Court.] **McDONALD v. CURRAN.** [Jan. 18.

*Fraudulent conveyance—Intent to defeat execution—R.S.O. 1897, cs. 115, 147—Amendment—Unjust preference—Following notes or proceeds—Disposition—Consideration—Bar of dower—Husband and wife—Transaction between—Bona fides.*

*Forrest v. Laycock*, 18 Gr. 611, cited by the Chancellor, is conclusive that where a wife in good faith claims to be entitled to dower, and refuses to join in the conveyance without a reasonable compensation being made to her, the payment made to her by the purchaser to induce her so to join in the conveyance is valid against the creditors of the husband.

**In Drewry v. Percival**, 19 O.L.R. 463, a question not unlike this was considered.

The appeal should be dismissed. There will be no costs (except disbursements, if any), the defendant appearing in person.

**Boyd, C.] RE BUCKLEY.** [Feb. 1.

*Will—Devise to two as tenants in common in fee—Restriction upon incumbering during lives—Validity—Restriction upon alienation except the one to the other—Invalidity.*

Appeal by Nicholas Buckley, petitioner, from the refusal of the Referee of Titles under the Quieting Titles Act to give the petitioner a certificate of title in fee to certain land under a will, free from the restriction imposed by the will.

Boyd, C.:—The testator gives land to two grandchildren, John and Nicholas, “to have and to hold unto them, their heirs and assigns, as tenants in common forever”; “without power to incumber the same during the lifetime of said John and Nicholas,” but with the “power of disposing of the right, title, and interest of the one to the other, but to no other person whomsoever.”

Nicholas has bought John’s share, and now seeks to quiet the title. The clause forbidding incumbering during the lifetime of John and Nicholas is valid as a competent restriction, and will apply to the land when in the sole ownership of Nicholas.

The other clause forbidding disposing of the land except from the one to the other appears to be legally inoperative. “Dispose” is the largest possible term as to dealing with the land,

covering sale, lease, mortgage, or testamentary disposition. According to *Attwater v. Attwater*, 18 Beav. 330, 336, if the testator intends to impose this fetter—that, if the brother will not buy, the devisee is not to be at liberty to sell the property to any one—such a condition is void and repugnant to the nature of the estate conveyed. On this point *Attwater v. Attwater* has not been impeached. See *In re Macleay*, L.R. 20 Eq. 186, at p. 192. The validity of the restriction is sought to be supported by reading the will as if the clause "during the lifetime of John and Nicholas" controlled all the clauses of the restriction. But, even so, it appears to me that the authorities are against regarding this as a permissible qualification of the restraint. In *Attwater v. Attwater*, though not so expressed, it is obvious that the extent of the fetter was during the lifetime of the devisee and the brother—their joint lives.

When it was submitted from the text-books, *In re Dugdale* (1888) 38 Ch. D. 176, 179, that a total restriction of alienation for a limited time may be good, the comment of Kay, J., was, "There is no decision to this effect."

On the other hand, *In re Parry and Daggs*, 31 Ch. D. 130, 134, Fry, L.J., said: "The courts have always leant against any device to render an estate inalienable"; and when the form of the devise was to fetter the power of alienation during the lifetime of the testator's son, to whom the land was given, the court held it was an illegal device.

*In re Rosher, Rosher v. Rosher*, 26 Ch. D. 801, decides that a condition in restraint of alienation annexed to a devise in fee, even though limited to the life of another living person, is void as being repugnant to the nature of a fee simple. And this was followed by MacMahon, J., in *Heddeslone v. Heddeslone*, 15 O.R. 280.

*Earls v. McAlpine*, 6 A.R. 145, to the contrary, was discussed adversely in *McRae v. McRae*, 30 O.R. 54, and was overruled by the Supreme Court in the *Blackburn* case, afterwards cited.

Legally and practically the effect of forbidding disposing of property to all the world except one individual is a general restraint, which is invalid, and, that being so, it was decided in *Blackburn v. McCallum* that any limitation as to time does not make it valid: (1902) 33 S.C.R. 65.

The restraint as to mortgaging in the life of the devisees is valid as to Nicholas; the other restraint as to disposal of the

land is void. Costs to the guardian of the infants, to be paid by the petitioner.

*M. Lockhart Gordon*, for the appellant. *J. R. Meredith*, for infants and all persons interested in opposing the petition.

Britton, J.]

WILSON v. HICKS.

[Feb. 2.

*Life insurance—Assignment of policy to stranger—Absence of delivery—Gift—Intention—Revocation—Insurance Act.*

The plaintiff in 1888 effected an endowment insurance on his life in the Mutual Life Insurance Company for \$5,000, and, by a subsequent writing, executed what purported to be an assignment to the defendant, Emma Hicks, of the policy. Afterwards he desired to appoint his niece, Helen Louisa Young, his beneficiary, but was told that the policy was already assigned, and that he was not at liberty to change. The policy matured on the 28th December, 1908, and the defendant claimed the amount, \$6,799.30. Neither the policy nor the assignment was delivered to the defendant, but the assignment was lodged with the insurance company.

The plaintiff asked for a declaration that he was entitled to be paid the moneys, and that the assignment to the defendant had been effectually revoked.

The money was paid into court by the company.

BRITTON, J., after stating the facts, said that it must be taken that there was no consideration for the assignment; if it holds as such, it must be as a gift inter vivos.

(Reference to *Weaver v. Weaver*, 182 Ill. 287; *In re Trough's Estate*, 75 Pa. St. 114.)

The policy being the thing given, there ought, in addition to the assignment evidencing the gift, to be an actual handing over of the thing itself or something equivalent to it, or some reason to the contrary, to comply with the rule of law, "To perfect a gift, the delivery must be, so far as the thing is capable of it, an actual delivery."

My conclusions are:—

(1) That there was no intention on the part of the plaintiff to give absolutely and irrevocably to the defendant the policy in question. It was his intention to make the policy payable to her at his death, should that occur before maturity of the policy, and subject to any change he might desire to make before such death or maturity.

(2) That the transaction was not such that the plaintiff transmitted the title to this policy and the money it represents to the defendant as donee.

(3) That there was no delivery, constructive or otherwise, of the assignment of the policy to the defendant.

My decision has been quite irrespective of the Insurance Act.

Apart from the form of the assignment in question, the plaintiff relies upon the Insurance Act, R.S.O. 1897, c. 203, s. 151, s.-ss. 3, 4, 5, as amended by 1 Edw. VII. c. 21, s. 2, s.-ss. 5, 6, 7.

The assignment lodged with the company did designate the defendant as beneficiary. She was not of the preferred class, and not a beneficiary for value, so the plaintiff had the right to change, as he has done.

The assignment was executed on the 22nd December, 1896, prior to the enactment of s. 159 of the Insurance Act; but, if "declaration" means or includes "declaration designating a beneficiary," as I think it does, then s.s. 4 of s. 151, of R.S.O. 1897, c. 203, makes it applicable to any contract of insurance or declaration made before the passing of the Act.

The judgment will be for a declaration that the plaintiff, subject to payment of the defendant's costs, is entitled to be paid the money due and payable under the policy in question, and that the paper called the assignment has been effectually revoked.

Owing to the special facts and circumstances of this case, it is not one for costs to the plaintiff, but is one where the costs of the defendant should be paid out of the money in court. The residue of the money will be paid out to the plaintiff.

*W. E. Middleton, K.C., and J. M. Best, for the plaintiff. W. Proudfoot, K.C., and F. Holmested, for the defendant.*

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Divisional Court.] BRENNAN v. CAMERON.

[Feb. 2.

*Foreign judgment—Action on—Defence—Foreign court not having jurisdiction over defendants—Domicil—Judgment of court of another province of Canada.*

Appeal by the defendants from the judgment of TEETZEL, J., in favour of the plaintiff in an action upon a judgment recovered by the plaintiff in the Supreme Court of British Columbia, on the 9th June, 1908, against the defendants for \$1,014.19 debt and \$45.63 costs.

The defendant D. H. Cameron was a person of unsound mind, and the defendant O'Heir was duly appointed his committee, and as such defended this action.

The defence relied upon was that the Supreme Court of British Columbia had no jurisdiction in respect of the subject-matter of the action in which the judgment was obtained, as the defendants were not at any time in the course of the action subjects of or resident or domiciled in the Province of British Columbia, and they did not appear or consent to jurisdiction; that the cause of action, if any, did not arise in British Columbia; and that the cause of action, if any, upon which the judgment was recovered, was marred by the Statute of Limitations in force in Ontario, where the defendants resided.

The judgment was proved by an exemplification, and, with the formal judgment, all the papers, including writ, order for substitutional service, etc., were before the court.

It was admitted that the defendants had resided in Ontario for 10 years.

The trial judge found in favour of the plaintiff for the amount of the British Columbia judgment and costs.

The judgment of the court was delivered by BRITTON, J., who, after stating the facts as above, referred to *Manning v. Scott*, 17 C.P. 606; *North v. Fisher*, 6 O.R. 206, and proceeded:—

In addition to what is disclosed by the papers in the action in British Columbia, the plaintiff gave evidence that his judgment was for \$500, money lent. It was the same \$500 for which the first judgment was recovered in British Columbia.

The authorities, I think, clearly establish that this plaintiff, in bringing his action in Ontario now, is in no better position bringing it upon the judgment recovered on the 9th June, 1908, than he would be if he brought it upon his judgment recovered on the 2nd August, 1889, or if he brought it upon his original cause of action, viz., for money lent.

(Reference to *Sirdar Gurdyal Singh v. Rajah of Faridkote* (1894) A.C. 670; *Emanuel v. Symon* (1908) 1 Q.B. 302; *Vezina v. Will H. Newsome Co.*, 14 O.L.R. 658.)

In this case it may be said, as it was in the *Vezina* case, at p. 664, that "the binding effect of the judgment sued on must, therefore, depend upon the rules of international law"; and, the appellants here not having been domiciled or resident in British Columbia when served with the writ of summons, the judgment must be treated in the courts of this province as a nullity.

Appeal allowed with costs and action dismissed with costs.  
*A. O'Heir*, for the defendants. *H. Arrell*, for the plaintiff.

Boyd, C.]

**RE MCKAY v. CLARKE.**

*Division courts—Jurisdiction—Splitting cause of action—Money lent—Separate loans.*

Motion by the defendant for prohibition to the Seventh Division Court in the county of Essex.

On the 3rd September, 1909, the plaintiff lent \$20 to the defendant at Fort Erie on a promise to repay it in a short time. On the 16th September the defendant wrote from Montreal asking a further loan from the plaintiff, and this was responded to by sending a cheque for \$50. On the 25th September the parties met in Toronto, and another loan of \$50 was made to the defendant. The defendant made another application from Hamilton to the plaintiff, who lived in Toronto, in consequence of which a cheque for \$25 was given to the defendant. On the 2nd October they met in Hamilton and another loan of \$25 followed.

The plaintiff brought two actions in the Division Court, one for the first two sums lent, amounting to \$70; the other for the remaining \$100.

The cases went to trial, and the evidence of the plaintiff was that each of the amounts advanced was a separate and distinct loan, without any reference to any further advance or loan of any kind, and upon the defendant's promise to pay in each instance, and with an offer to give his several promissory notes for each sum if desired.

The defendant objected to the jurisdiction, on the ground that the whole was one transaction, suable as one cause of action for money lent and could not be split into two actions: Division Courts Act, R.S.O. 1897, c. 60, s. 79.

The objection was overruled, and judgment entered for the plaintiff in both cases.

The motion for prohibition was on the same ground.

The Chancellor referred to *Re Gordon v. O'Brien*, 11 P.R. 287, 294; *Re Clark v. Barber*, 26 O.R. 47; *Re McDonald v. Dowdall*, 28 O.R. 212; *Re Real Estate Loan Co. v. Guardhouse*, 29 O.R. 602; *Re Bell v. Bell*, 26 O.R. 123, 601; and said that the present case stood clearly apart from those cited, which were decisions on causes of action arising out of one controlling contract. The same idea of connection or continuity exists where liabilities are incurred in a series of dealing which are linked together, in this sense that each dealing is not intended to terminate with itself but to be continuous, so that one item shall go with the next item and so form one entire demand. But such

is not the case here, according to the evidence and finding of the judge. These claims, while similar in character, are yet for moneys lent as distinct loans at different times and places, but pursuant to no course of dealing, and not necessarily to be massed en bloc for the purpose of litigation.

The present case is within the authority of *Rex v. Herefordshire*, 1 B. & Ad. 672. See *Harvey v. McPherson*, 6 O.L.R. 60.

Application refused with costs.

*Frank McCarthy*, for the defendant. *J. T. White*, for the plaintiff.

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Master in Chambers.]

[Feb. 7.

CANADA CARRIAGE CO. v. DOWN.

Venue—Change—County Court.

Upon motion of the defendants, an order was made transferring the action from the County Court of York to the County Court of Perth. The action was for the price of a waggon made by the plaintiffs, who carried on business at Brockville, and sent to the defendants at Stratford. The Master thought it would be reasonable to have the trial at Stratford, where the waggon could be inspected by the judge and witnesses. Costs in the cause.

*H. E. Rose*, K.C., for the defendants. *Mervil Macdonald*, for the plaintiffs.

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Master in Chambers.]

[Feb. 9.

STIDWELL v. TOWNSHIP OF NORTH DORCHESTER.

Venue—Change—Expense.

Motion by defendants to change the venue from St. Thomas to London. The Master held that, with an hourly electric service between the two cities, there would scarcely be any substantial difference in cost; and pointed out that a successful defendant can always apply to the trial judge for a direction as to the taxation of the costs of the witnesses if it appears that the costs have been materially increased by the trial being at the place chosen by the plaintiff. Motion refused; costs in the cause.

*H. S. White*, for the defendant. *J. F. Lash*, for the plaintiff.

Mulock, C.J. Ex.D.]

[Feb. 9.

RE NIAGARA FALLS HEATING AND SUPPLY CO.

*Company—Winding-up—Contributory—Shares illegally issued at half price—Liability of subscriber for balance of price—Conduct—Receipt of dividend—Estoppel.*

Appeal by J. G. Cadham and others from the report of the local Master at Welland, who placed the appellants upon the list of contributories of the company, in liquidation under the Winding-up Act.

The evidence shews that Cadham agreed to subscribe for four shares of \$50 each in the capital stock of the company, and upon the 17th September, 1906, paid \$200 to the company for eight shares. Thereupon the company issued and delivered to him a certificate, bearing date the 14th September, 1906, to the effect that he was the owner of eight shares of \$50 each in the capital stock of the company. This certificate he accepted and gave to the company a receipt therefor in the following words: "Received certificate No. 28 for eight shares this 17th day of September, 1906. J. G. Cadham." Thereupon Cadham's name was entered in the books of the company as shewing Cadham the holder of eight shares of \$50 each.

On the 19th January, 1907, the board of directors ordered that "a four per cent. dividend be paid per annum based on the said report for three months in which business has been done, namely, October 1st to December 31st, 1906." At this time Cadham was treated by the company as being a shareholder to the extent of \$400, the year's dividend upon which, at the rate of 4 per cent. per annum, would amount to \$16, and, on the 4th of March, 1907, the company issued its cheque of that date upon the Bank of Hamilton, payable to J. G. Cadham or bearer, for \$4, the three months' dividend at the rate of 4 per cent. per annum—the body of the cheque containing the word "dividend." This cheque Cadham received and indorsed, obtaining and retaining the proceeds thereof.

How can he be entitled to retain the dividend and at the same time say that he is not the holder of the shares which alone entitle him to the dividend? Although in the first instance he may not have intended to subscribe for eight shares, yet the company having placed his name upon the lists of members to the extent of eight shares, his subsequent conduct is evidence of an agreement upon his part to become such member, and he is now

estopped from denying such membership: *In re Railway Time Tables Publishing Co., Ex p. Sandys*, 42 Ch. D. 112.

T. W. Griffiths, for the contributors. T. F. Battle, for the liquidator.

## Province of Nova Scotia.

### SUPREME COURT.

Full Court.] THE KING v. SWEENEY. [Feb. 5.

*Constable—Powers to arrest on view—Employment by private corporation—Loitering about streets—Sufficiency of charge—Magistrate—Jurisdiction to try and convict—Town by-law—Variation from statutory provision.*

Defendant was arrested by a constable of the town of Glace Bay charged with loitering on the streets of the town after midnight and refusing to go home or get off the streets after having been warned that he was violating the law and that he would be arrested if he persisted in doing so.

*Held*, that the offence was one for which the constable was justified in arresting without warrant, and that defendant having been lawfully brought before the stipendiary magistrate of the town by arrest, on view it was unnecessary that there should have been any warrant or information to give him jurisdiction to deal with the case.

Also, that the fact of the constable having been employed and paid by a private corporation for the protection of their property did not disqualify him from performing his duty in making the arrest or affect the jurisdiction of the magistrate, who was not called upon to inquire into the authority of the officer, but to sit in judgment upon the offence for which he arrested the accused.

The town council framed a by-law in respect to loitering (among other offences) in which the provisions of the statute were duplicated but a lesser penalty was imposed.

*Held*, that this fact would not stay the hand of the magistrate, who would be governed by the explicit terms of the statute, and who appeared to have proceeded under the statute and not under the by-law.

*Held*, also, that the charge as entered by the constable "loiter-

ing about the streets" was within the words of the statute "loitering in the streets" and was not calculated to mislead defendant.

*W. B. A. Ritchie*, K.C., in support of appeal. *Mellish*, K.C., and *L. A. Lovett*, contra.

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Full Court.]                    *MCQUARRIE v. DUGGAN.*                    [Feb. 5.

*Cabman—Lien on passenger's baggage for fare—Master and servant—Right of master to intervene to recover servant's property—Jury—Unreasonable verdict set aside—Opinion of trial judge.*

A cabman who undertakes to drive a passenger to his destination is justified in detaining a portion of the passenger's baggage as a means of enforcing payment of his legal fare, but he has no other right than this and where plaintiff having been tendered the legal fare demanded an equal amount for baggage carried which the passenger, defendant's servant, was unable at the moment to pay, but which plaintiff was told would be paid on the return of defendant, who was expected to arrive immediately, and plaintiff was proceeding to carry away a portion of the baggage, and defendant arriving grasped plaintiff's horse by the head and stopped the carriage.

*Held*, *GRAHAM*, E.J., dissenting as to facts, that defendant was justified in taking the action he did to regain possession of his servant's property.

Where on the trial of an action claiming damages for assault the jury declined to accept the directions of the trial judge, and disregarding the evidence of defendant and two credible witnesses, by whom he was supported, contradicting plaintiff's statements as to any personal assault, and accepting the evidence of plaintiff, who appeared to have been under the influence of intoxicants at the time, gave their verdict in plaintiff's favour.

*Held*, that there must be a new trial.

Also, that in such a case the opinion of the trial judge, who has all the parties before him, and is in a position to estimate the credit to be given to them, is of peculiar value.

*J. J. Ritchie*, K.C., in support of appeal. *W. B. A. Ritchie*, K.C., contra.

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Full Court.]    **CARROLL v. DOMINION COAL Co.**                [Feb. 12.

*Deed—Covenant not running with land.*

Plaintiff on his own behalf and other heirs of C. conveyed to the Low Point, Barrsois and Lingan Mining Co., a certain lot piece or parcel of land described in the deed subject to certain reservations, provisoos, conditions and covenants to be performed and kept by the parties of the second part, their successors and assigns, one of which was that the parties of the second part, their successors, etc., should give or cause to be given annually to the party of the first part and his heirs sixty tons of slack coal for the benefit and use of the heirs of C.

The Low Point Co. conveyed the land described in the deed to the defendant company.

*Held*, that the covenant in relation to the supply of coal was not one running with the land, but was merely personal or collateral and was not binding upon the defendant company.

*J. J. Ritchie*, K.C., in support of appeal. *L. A. Lovett*, K.C., contra.

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Full Court.]                **CROWE v. GOUGH.**                [Feb. 12.

*Sale of goods—Breach of contract—Failure to prove damage.*

Defendant contracted to purchase from plaintiff tobaccos to the amount of \$300 per week of such brands as plaintiff should have in stock at prices mentioned in a schedule delivered to defendant at the time of the making of the agreement.

Defendant failed to carry out his undertaking by purchasing to the amount agreed and finally ceased buying altogether.

*Held*, that the judge of the County Court erred in assessing damages for an estimated loss of profit that would have been earned by plaintiff if defendant had carried out his contract, in the absence of evidence to shew that plaintiff suffered any loss by reason thereof.

Per TOWNSHEND, C.J.:—On principle plaintiff was entitled to recover more than nominal damages, but in the absence of evidence to shew exactly what the damage was, it was impossible to allow the amount assessed by the County Court judge.

Per MEAGHER, J.:—There was a breach every time defendant failed to take goods according to contract and there was room for the contention that inasmuch as the terms of the contract required plaintiff to keep goods on hand, he would be entitled to

damages in the nature of interest upon the value of the stock he was obliged to keep on hand to meet the terms of the agreement. *Murphy*, in support of appeal. *Russell*, contra.

Full Court.]            **THE KING v. QUIRK.**            [Feb. 12.

*Intoxicating liquors—Sale to minor—Owner of premises—Liability for act of servant contrary to instructions—Conviction restored.*

The Nova Scotia Liquor License Act, R.S. 1900, c. 100, s. 62, provides that a licensee shall not give, supply or furnish, or allow to be given, supplied or furnished, in or upon his licensed premises, any description of liquor to any minor, and every licensee who gives, supplies or furnishes any liquor to any minor in contravention of this section shall be liable, etc.

Defendant was convicted by the stipendiary magistrate of a violation of this section of the Act, but the conviction was set aside on appeal to the County Court on the ground that it appeared from the evidence that the liquor in question was supplied by one of defendant's employees without defendant's knowledge and contrary to his instructions.

*Held*, reversing the judgment of the County Court judge and restoring the conviction that the section of the Act is an absolute prohibition in the interests of the public to prevent the sale or supply of liquor to minors and that the act of the servant being within the scope of his duty, defendant was liable to the penalty provided by the Act, notwithstanding the fact that the servant acted without defendant's knowledge and in violation of his instructions.

*Meagher*, in support of appeal. *J. J. Ritchie*, K.C., contra.

Full Court.]            [Feb. 12.

**MATTHEWS v. CANADIAN EXPRESS CO.**

*Carriers—Perishable article—Loss through unavoidable delay—Evidence—Findings of jury set aside—New trial.*

Defendants, an express company, undertook to forward a quantity of fresh fish for plaintiffs from Port Mulgrave, in the Province of Nova Scotia, to New York, and the evidence shewed that defendants spared no effort to have the fish forwarded with all possible despatch, but on account of the journals of the car, upon which they were placed, heating, the car was delayed at two

points, and when the fish arrived at their destination they were spoiled, and that the accident which caused the delay was one which could not have been avoided.

*Held*, that the trial judge erred in not submitting to the jury questions tendered on behalf of defendants and intended to secure the finding of the jury as to where the defendants were negligent or failed in their undertaking, such finding being material to the decision of the case.

The jury found in answer to the only question submitted that defendant company did not deliver the fish within a reasonable time, looking at all the circumstances of the case.

*Held*, that the latter finding was against the weight of evidence and could not stand and that there must be a new trial.

*Mellish*, K.C., in support of appeal. *W. B. A. Ritchie*, K.C., and *J. A. Fulton*, contra.

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Full Court.]                    *PATTERSON v. CAMPBELL*.                    [Feb. 12.

*Bills and notes—Statute of Limitations—Payment by surety after statute has run—Does not give right to contribution as against co-surety.*

The makers of a joint and several promissory note are joint contractors within the meaning of the Statute of Limitations, R.S. 1900, c. 165, s. 5, and Lord Tenterden's Act and where such a note was entered into by plaintiff and defendant as sureties for C., the principal maker, and the note was dishonoured by C., and was paid by plaintiff after the Statute of Limitations had run as against the payee in favour of plaintiff and his co-surety.

*Held*, that such payment was voluntary on the part of plaintiff and that he could not by waiving in his own favour the defence of the statute, establish a claim against his co-surety for contribution.

*J. J. Ritchie*, K.C., in support of appeal. *Mellish*, K.C., contra.

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Full Court.]                    *WOODWORTH v. LANTZ*.                    [Feb. 12.

*Land—Agreement to lease for lumbering purposes—Word “belonging”—Title acquired subsequently—Representations—Estoppel.*

Plaintiff entered into an agreement in writing with defendant to lease to defendant for the term of fifteen years, for

lumbering purposes all the timberland and woodland "belonging" to plaintiff at A. At the time of the making of the agreement plaintiff represented to defendant that he was the owner of the whole block of land referred to and defendant acted upon that representation, the fact being that the title to a portion of the block was in the Crown, although plaintiff was in occupation, and, by virtue of such occupation, had a prior right to a grant as against other applicants. Plaintiff subsequently applied for and obtained a grant of the portion of the land previously ungranted.

*Held*, that he was precluded from saying that the whole block, including the disputed area, did not belong to him.

Per GRAHAM, E.J.:—When plaintiff obtained the grant from the Crown he became trustee for defendant of the title and must include it in his lease.

*Mellish*, K.C., and *Whitman*, in support of appeal. *W. B. A. Ritchie*, K.C., and *H. B. Stairs*, contra.

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Russell, J.]                   ADAMS v. SLAUGHENWHITE.                   [Feb. 24.

*Collection Act—Provisions not applicable to married women.*

The damages recoverable from a married woman in respect of her contracts are payable only out of her separate property and not otherwise (R.S. 1900, c. 112), and therefore she is not a debtor within the meaning of R.S. 1900, c. 182, the Collection Act and the provisions of that statute are not applicable to her.

*Held*, that a motion for a writ of prohibition to restrain a commissioner from proceeding with the examination of a married woman under the Collection Act must be allowed.

*Meagher*, in support of application. *Russell*, contra.

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## Province of Manitoba.

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### COURT OF APPEAL.

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Full Court.]                   SIMPSON v. DOMINION BANK.                   [Jan. 17.

*Husband and wife—Married woman's separate property—Interpleader—Estoppel.*

Interpleader issue between an execution creditor and the wife of the judgment debtor as to the ownership of horses and cattle.

The evidence shewed that the wife had money of her own before she married, that with that money she, after the marriage, bought cattle, that she exchanged part of the increase of these cattle for other cattle and for horses, and that in that way, between purchases, exchange and increase, she had acquired the animals in question.

The evidence also shewed, however, certain isolated instances of the husband dealing with some of these animals, amongst others he had given a chattel mortgage on some of them with the wife's consent.

*Held*, that the wife was entitled to a verdict upon such evidence, and there would be no estoppel as against her except in favour of the chattel mortgagee.

*Haffner v. McDermott*, K.B., Manitoba, unreported, followed.

*Fullerton*, for plaintiff. *Haffner*, for defendants.

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Full Court.]      *Tett v. Bailey Supply Co.*      [Jan. 17.

*Adjournment of trial by judge mero motu to admit further evidence—Judicial discretion.*

When, at the trial of an action in a County Court, both parties have put in all their evidence, and the judge comes to a conclusion as to the proper verdict to be rendered, it is not a proper exercise of judicial discretion, under s. 131 of the County Courts Act, R.S.M. 1902, c. 38, for him of his own motion, without an application by either party or any suggestion as to further evidence being available, to postpone the giving of judgment to allow either party to put in further evidence, and the Court of Appeal will, in such a case, order that judgment be entered in the County Court in accordance with the conclusion arrived at by the trial judge, subject to all rights of parties as if it had been so entered originally by his direction.

*Bergman*, for plaintiff. *Noel Bernier*, for defendant.

## Bench and Bar.

### THE LAW SOCIETY OF ALBERTA.

The following is a summary of the proceedings of the fifth convocation held at Edmonton on the 11th and 12th days of January, 1910:—

Present—James Muir, K.C. (President); C. F. P. Conybeare, K.C. (Vice-President); W. L. Walsh, K.C.; J. C. F. Bown, K.C.; D. G. White, Geo. W. Greene, O. M. Biggar and E. P. McNeill.

The usual number of communications, matters of discipline and special petitions were received and referred to the proper committees for consideration and recommendations.

The secretary-treasurer presented his balance sheet for the half year ending December 31st, 1909, properly audited, together with statement of assets and liabilities.

The solicitor of the society reported on matters of discipline which he had dealt with since his last report and on his work as editor and examiner for the same period.

Several matters of reporting and discipline having been considered by the committee on reporting, printing and discipline, it was resolved that the recommendations of the committee be concurred in.

The examining and legislation committee reported on a number of petitions for special relief, for enrolment and relating to other matters, and same were dealt with in accordance with committee's report. On this committee's report a memorial from the benchers was ordered to be forwarded to the Attorney-General bringing to his attention the necessity for bringing into force at the earliest possible day the legislation respecting the sixth judge of the Supreme Court and that such judge should, upon his appointment, be stationed at Calgary in order that the great volume of business required to be done there, particularly in judges' chambers, might be transacted as speedily and easily as possible.

The report of the finance and library committee was also received and adopted with some amendments. This report covered the estimate of the receipts and probable expenditures for the first six months of 1910 and made grants for the addition of new text books for the law libraries throughout the province.

The special committee appointed at July, 1909 Convocation, to meet a committee of the senate of the University of Alberta for

the purpose of considering joint arrangements in regard to legal education, brought in its report, which was adopted. It contained the following recommendations:—

1. That the standard of admission as a student-at-law should be raised from ordinary to senior matriculation on and after January 1st, 1911.
2. That applicants for admission as students-at-law who have second year standing at the University of Alberta, should be required to serve under articles during only four years instead of five.
3. That the examinations of law students both intermediate and final, prescribed for admission to the bar, should be held by the University of Alberta, it being understood that the Law Society obtain representation upon the senate.
4. That the university should, as soon as possible, undertake the provision of lectures in legal subjects.

The special committee was re-appointed to settle a draft contract with the university along the lines of this report and to submit the same to next convocation.

Report of a special committee appointed to draft an amendment to the rules providing for admission of practitioners from points outside of His Majesty's dominions, recommended that rule 44c. be repealed and the following substituted:—

44c. "Any person being a qualified legal practitioner of a foreign country may be enrolled as a student-at-law upon payment of the fee prescribed for enrolment and upon satisfying the examining and legislation committee as to his standing on the law list of such foreign country and upon entering into articles of clerkship with a member of this society for a period of three years and shall thereafter be admitted as a barrister and solicitor upon furnishing satisfactory evidence as to his character and of service under such articles, and upon passing the final examination and upon payment of the fee imposed upon a student for admission to the bar."

A largely signed petition from members of the society dealing with recent amendments to rule 35a was received, and after consideration the following resolution was adopted:

That convocation has carefully considered the petition of R. B. Bennett, K.C., and others, but finds it impossible to agree with the petitioners that the rules of the society be so framed as to make it possible for students to escape from the requirements of actual practical service in a law office, so

as to reduce his practical experience to less than the period of three years, but considers that pending satisfactory provision being made for academic legal education in this province a matriculant student might be permitted at any time during his term of service to spend two years continuously at one of the law schools approved by the examining and legislation committee for that purpose, that the time spent at such law school, as shown by proper certificates, might be allowed as part of his term of service, and that rules conflicting with this resolution should be amended accordingly, and that the examining and legislation committee shall have power to deal with pending and future applications to convocation in accordance with the terms of this resolution.

The following rule was adopted as a rule of the society:

(1) *No member of the society shall either on his own behalf or on behalf of any other person, request or canvass votes at any election of benchers or give any notice to any person that he, or any other person is a candidate at such election.*

(2) No distinction shall be made between retiring benchers and other members of the society in any list of members eligible to vote at any election of benchers and no list of retiring benchers shall be given by the secretary at or before such election.

(3) A copy of this rule shall be forwarded with his voting paper to each member of the society eligible to vote.

The secretary was instructed to suggest to the Attorney-General and the Minister of Public Works the desirability of utilizing any available space at the new Land Titles Office at Calgary to relieve the congestion at present existing in the offices of the clerks of the Supreme and District Courts at Calgary.

Rule 14 of the society was repealed.

Convocation then adjourned to meet at Red Deer on Tuesday, 28th June, 1910, at 2 p.m.

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### Book Reviews.

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*Butterworth's Yearly Digest.* London: Butterworth & Co. 1910.

This digest contains the reported cases decided in England and includes a copious selection of cases decided in the Irish and Scotch courts for the year 1909. It is the second annual supplement of Butterworth's valuable Ten Years' Digest.

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*Saskatchewan Law Reports.* Editor: ALEXANDER ROSS, Regina.  
Toronto: Canada Law Book Company, Limited.

Parts 1 and 2 of Vol. II. have recently been issued. This series of Reports, which is ably edited by Mr. Alexander Ross, of Regina, follows the general style of the Ontario Law Reports, and the printing, paper and make-up reflects credit alike on editor and publishers.

*O'Brien's Conveyancer.* 4th edition. By A. H. O'BRIEN, M.A.  
Toronto: Canada Law Book Company, Limited. 1910.

The fact that a fourth edition of this work has been called for is eloquent testimony to its popularity and usefulness. Each successive edition has been a distinct advance on the preceding one. The new edition is no exception and contains practically all the forms that are required in conveyancing practice.

*Canada Law Journal.* Vol. XLV.

The completed volume for 1909 contains an unusual number of special articles dealing with subjects of present interest and importance. The review of current English cases, which is full and complete, is alone worth the subscription price. On the whole, the present volume maintains the high level which is a distinguishing feature of the oldest legal publication in Canada.

*Butterworth's Workmen's Compensation Cases.* Vol. II., new series. By HIS HONOUR JUDGE RUEGG, K.C., and DOUGLAS KNOCKER, of the Middle Temple, Barrister-at-law. London: Butterworth & Co. 1910.

This new series of reports is a continuation of "Workmen's Compensation Cases" edited by the late R. M. Minton-Senhouse, which consists of nine volumes. The present volume, being the second of the new series, contains reports of cases decided under the Workmen's Compensation Acts during the period from September, 1908, to September, 1909. It contains also a table of cases reported in the nine volumes of the old series and of the cases reported in Vols. I. and II. of the new series. It is needless to point out the great utility of these reports. They deal with a branch of law that is of growing importance in every industrial community, and the names of the editors are a sufficient guarantee of their trustworthiness.

*Canadian Criminal Cases.* Vol. XIV. By W. J. TREMEAR.  
Toronto: Canada Law Book Company, Limited.

The Canadian Criminal Cases form the Canadian counterpart of Cox's Criminal Cases in England, and has won an enviable reputation both in Canada and the United States. As an aid to criminal practice, the series is indispensable. The present volume contains reports of the important decisions of all the Canadian courts during the past year.

*The Law of Merchandise Marks.* By D. M. KERLEY, M.A., Third edition by F. G. UNDERHAYE, M.A. London: Sweet & Maxwell, Limited, 3 Chancery Lane, W.C. 1909.

Included in this is the criminal law of false marking, with a chapter on warranty of trade marks and a collection of statutory general orders and forms. The law on this subject was formerly included in Kerley on Trade Marks, but it has been found more convenient to have the two subjects treated separately. The cases on the subject in our own courts are not numerous, but any one who has to look into this edition by Mr. Underhaye will find it invaluable.

### Flotsam and Jetsam.

It was a clever lawyer in a Boston court recently who took advantage of the nautical knowledge he possessed to work upon the mind of a juryman who did not seem to shew much comprehension of a case of suing a street railway for damages.

The dull member was an old sailor, who, though doubtless very keen of perception along some lines, was, nevertheless, rather slow in his understanding of the points involved in the case being tried. The lawyer noticed this and made his strike with this particular man. Approaching the jury box he addressed himself to this one jurymen and said:—

“Mr. Juryman, I will tell you how it happened. The plaintiff was in command of the outward bound open car, and stood in her starboard channels. Along came the inward-bound closed car and just as their bows met she jumped the track, sheered to port, and knocked the plaintiff off and ran over him.”

The sailor was all attention after this version of the affair, and joined in a \$5,000 verdict for the injured man.—*Gloucester (Mass.) Times.*

# Canada Law Journal.

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VOL. XLVI.

TORONTO, MARCH 15.

No. 6.

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## THE PROPOSED HIGH COURT OF NATIONS.

With the first Hague Conference which met in 1899 an International Arbitration Court came into existence. The Permanent Court of Arbitration, as it is technically called, though popularly known as the Hague Court, settled the *Pious Fund* case, the *Venezuela Preferential Payment* case, the *Japanese House-tax* case and the dispute between Great Britain and France over their treaty rights in Muscat, passed upon the Casablanca incident, and adjusted the dispute between Norway and Sweden as to their maritime frontier. It is of special interest to Canadians at the present time for the reason that there is now pending before it our fisheries dispute with the United States.

But besides this court, which is actually in service, are two others, both of them projected by the second Hague Conference, that may also go into operation when certain formalities are complied with or certain necessities arise. One of these is the International Prize Court, which is for the adjudication of cases of capture of neutral merchant ships and cargoes in time of war, a code for which was made at the Naval Conference held in London in 1909, but is not yet ratified by the nations that are parties to it. The other is the Court of Arbitral Justice, also called the Judicial Arbitration Court, which is for the same kind of cases that now go before the Permanent Court of Arbitration. It is the Court of Arbitral Justice, an institution that is known to but comparatively few, and that may easily be confused in the popular mind with the present Hague Court, to which we wish to call attention.

The progress which has been made toward the establishment of this court is due primarily to the efforts of three great American lawyers, ex-Secretary Root, Prof. James Brown Scott and Hon. Joseph H. Choate, especially the two first named. All who attended the opening session of the National Peace Congress

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in New York in 1907, which was organized for the purpose of bringing public sentiment to bear on the Hague Conference, will remember the profound impression made by Mr. Root's address. In it occurred these significant passages, which may be taken as the foundation ideas of the proposed court:—

"In the general field of arbitration we are surely justified in hoping for a substantial advance, both as to scope and effectiveness. It has seemed to me that the great obstacle to the universal adoption of arbitration is not the unwillingness of civilized nations to submit their demands to the decision of an impartial tribunal; it is rather, as Lord Salisbury said, an apprehension that the tribunal selected will not be impartial.

"The feeling which Lord Salisbury so well expressed is, I think, the great stumbling-block in the way of arbitration. The essential fact which supports that feeling is, that arbitrators too often act diplomatically rather than judicially; they consider themselves as belonging to diplomacy rather than to jurisprudence; they measure their responsibility and their duty by the traditions, the sentiments, and the sense of honourable obligation which have grown up in centuries of diplomatic intercourse, rather than by the traditions, the sentiments, and the sense of honourable obligation which characterize the judicial departments of civilized nations.

"What we need for the further development of arbitration," added Mr. Root, "is the substitution of judicial action for diplomatic action, the substitution of judicial sense of responsibility for diplomatic sense of responsibility. We need for arbitration, not distinguished public men concerned in all the international questions of the day, but judges who will be interested only in the question appearing upon the record before them. Plainly this end is to be attained by the establishment of a court of permanent judges who will have no other occupation and no other interest but the exercise of the judicial faculty under the sanction of that high sense of responsibility which has made the court of justice in the civilized nations of the world the exponents of all that is best and noblest in modern civilization."

Professor Scott, whose name will always be associated with historic attempts to make a High Court of Nations, gave much thought and care to the proposed court at the time and has done his utmost ever since to have it made into a living agency of justice. His plan was brought before the Conference by Mr. Choate, who assisted him enthusiastically. It had the joint sponsorship of the United States, England and Germany. No less strenuous a personage than Baron Marschall von Bieberstein, Germany's first delegate, expressed the belief that such a court would automatically attract to itself the disputes of nations for settlement.

The agreement providing for the court contains thirty-five articles. The first article reads as follows:—

"With a view of promoting the cause of arbitration, the contracting powers agree to constitute, without altering the status of the Permanent Court of Arbitration, a Judicial Arbitration Court of free and easy access, composed of judges representing the various juridical systems of the world, and capable of ensuring continuity in jurisprudence of arbitration."

The main features of the proposed court correspond with Mr. Root's idea of a court of law. They may be best appreciated by a comparison with the so-called Permanent Court of Arbitration. First of all, the proposed institution is a court, and not a panel. The number of its judges, though not given in the agreement, is expected to be fifteen, with deputies as alternates. Fifteen members would mean nearly twice as large a body as the Supreme Court of the United States, which consists of nine judges, but is small compared with the number allowed to the court of 1899, which may consist of four arbitrators from every one of the forty-six states that are commonly recognized as belonging to the family of nations, though two or more states may choose the same judges and may therefore go outside their own nationality for their appointees.

Furthermore, the members of the court of 1899 are appointed for a term of but six years, though their appointment is renewable. The judges of the proposed court would have a term of twelve years, which is also renewable. The judges of the court of 1899 are

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paid only when they are on duty, which is when they have a case to try. The judges of the proposed court would be paid a salary of \$2,400 a year from the time of their appointment, and receive about \$40 a day, with travelling expenses additional, when they go into session. The draft of the agreement contemplates an annual session beginning the third Wednesday in June, provided public business requires it; besides the election annually of three of the members, with substitutes, as a Permanent Delegation in residence at The Hague and always ready to try minor cases or cases for summary procedure. The Delegation is a unique and promising feature of the proposed court. It makes the court free and easy of access, which is desirable, and is an advantage over the system of the court of 1899, whose tribunals have to be especially summoned, even for a minor case. It is given large power, but cannot perpetuate itself at the expense of the whole court, as it is not only subject to election by the general body, but may at any time, on application of the nations, be superseded by it. The whole court may at any time be summoned in extraordinary session by the Delegation.

The proposed Judicial Arbitration Court, to be sure, if installed to-day, would not be open to all nations, as is the present Hague Court, but only to the nations which accept it by entering into a special contract. These nations, however, acting as a whole and not separately, are to pay the salaries of the judges, a method that is an improvement on the court of 1899, as under its system each litigant pays its own judges, a thing that would not be tolerated in a judicial court in municipal law. The costs of the proposed court, apart from the salaries of the officers, are apportioned among the litigants, who are also required to pay their own charges for counsel, witnesses, etc. No judge will be allowed to sit on a case in the decision of which he has already taken part in its earlier stages in national courts, nor can he appear before the court as counsel or advocate in any case, as men have done before the court of 1899. A judge is not permitted to receive money or hold any office under authority of one of the litigants, or of his own nation, inconsistent with his duties as a judge. In these respects, then, the new court is more

truly judicial than the court of 1899, and, though limited to the contracting powers, is fundamentally more international in its spirit.

The court is supposed to sit at The Hague, but may sit elsewhere if obliged to do so. The Delegation may, of its own accord, hold its sessions elsewhere with the consent of the parties, if circumstances make a change of place necessary. The court may call upon states to help it in serving notices and securing evidence. It determines the language that is to be used in cases coming before it. It discusses its cases and makes decisions upon them in private session under the control of a president or vice-president; but a judge who is appointed by one of the parties may not preside. A judge cannot serve as a member of the Delegation "when the power which appointed him, or of which he is a national, is one of the parties" (Art. 6). The decisions of the court must be made in writing by a majority of the judges present, who must give the reasons for their opinions and disclose their names. The judgment must be signed by the president and registrar. The court is authorized to improve upon its rules of procedure, but must communicate them to the contracting powers for approval.

Such are some of the superior features of the proposed Court of Arbitral Justice. It is not, however, intended to supplant the court of 1899, but to be used instead of it if litigants prefer its services. It is stipulated that its members shall be taken, as far as possible, from the judges of the Permanent Court of Arbitration. In common with that court it follows the procedure laid down in the Convention for the Pacific Settlement of International Disputes, except as it is empowered specifically to make its own rules. Its jurisdiction is as large as possible. It may take cases coming to it by a standing treaty of arbitration or by a special agreement.

This proposed International High Court of Justice should have the hearty support of Canadians and, indeed, of all lovers of peace the world over. We subscribe to the view so well expressed by Professor Kirchwey, Dean of the Law School of Columbia University: "There is an increasing and well-nigh

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irresistible pressure upon the nations—from within and from without—for the avoidance of war, and this rising tide needs only one thing to give it effect, and that is an adequate method for the settlement of international differences without the necessity of a resort to arms. This method now presents itself in an international tribunal composed of permanent judges of the highest character for learning and disinterestedness, administering justice according to law. It is the existence of such tribunals which has induced us to abandon private warfare as a means of settling our personal controversies, and it cannot be doubted that the same motives will operate with equal effect in the larger field of international relations. With the institution of such a tribunal of the nations, the reign of law will be at hand. "Force and right rule the world," said Rochefoucauld; "Force till right is ready." The hour prefigured in the maxim of the soldier-philosopher has struck. Right is ready."

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#### **THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.**

The Honourable Mr. Justice Riddell delivered an interesting address in September last at a meeting of the Missouri Bar Association, on the subject of the Judicial Committee of the Privy Council. It has been reprinted from the report of the proceedings of the meeting, and while it contains much that is familiar to Canadian readers, it is well worth perusal. Mr. Justice Riddell sketches the history of the origin and development of the appellate jurisdiction of the Privy Council and distinguishes the final court of appeal in England known as the House of Lords, with which the Privy Council is often confused, especially by Americans. After describing the constitution and personnel of the Committee Mr. Justice Riddell adds: "This body is not a court, it is a Committee appointed to consider certain legal questions and report thereon to His Majesty's Privy Council. There is no instance in which all those who are qualified actually sit; I have never seen more than seven—nor less than four; three, exclusive of the Lord President, constitute

a quorum. These Privy Councillors are clothed as ordinary English gentlemen without official garb of any kind, although counsel appearing before them must wear the black gown, silk or stuff according as he is or is not a King's counsel, bands of white lawn and wig of horse hair. In Ontario we wear all these except the wig, but I found that one becomes accustomed to the wig very quickly and very easily. I presume it strikes the Englishman with the same sense of incongruity when he enters our courts and sees judges and counsel with gown and white bands but without wig as it does an Ontarian when he sees certain American judges sitting in court with a gown, but also with a black necktie.

"Being a Committee and not a court, the decision a report, no dissent is expressed—one of the Committee gives the opinion of the Committee and no one knows in any case how the members of the Committee were divided or if they were divided. While the House of Lords is bound by its own judgments, such is not the case with the Judicial Committee, the Committee may and sometimes does decline to follow the law as laid down in previous cases. Their Lordships consider themselves at liberty and, indeed, bound to examine the reasons upon which a previous decision was arrived at, and if they find themselves forced to dissent from those reasons, to decide upon their own view of the law. I do not know that this has ever actually been done in questions of the law of property, but it has in matters affecting the forms of worship, etc., in the Church of England. For example, in the well-known case, *Read v. Bishop of Lincoln* (1892), A.C. 644, the previous decision in *Hebbert v. Purchas*, L.R. 3 P.C. 651, 23 years before, was not followed, as their Lordships found themselves unable to concur in the reasoning. It has, however, been said—even in a case involving property—by the Committee (upon a previous case before that Board being cited as an authority absolutely binding upon them) that it would have been their duty had the necessity arisen to consider for themselves whether the decision was one which they ought to follow (1891, A.C., at p. 282).

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"The Committee sits in an old building on the north side of Downing Street, Westminster, not far from the Abbey and the Parliament Buildings. The Board is on the floor toward the middle of the room; the counsel upon a raised platform to the east side, communicating with the robing rooms, etc. The platform is accommodated with a small reading desk upon which counsel addressing the Board may rest his books and papers—all the proceedings in the courts below are in printed form as also the points relied upon by each side. Whenever a case cited is not thoroughly well known the report is brought at once from the book cases lining the walls of the room; and each point, as a rule, is thoroughly threshed out at the time by court and counsel, so that even if judgment should be reserved counsel generally know pretty well what the result will be . . . .

"There is an advantage that the members of the Board are removed from the scene of the facts upon which litigation arises—they cannot be thought to be influenced by public opinion or public clamour; in questions of great constitutional moment which have awakened party discussion and party feeling, they are away from and above party; in matters of public policy they cannot be conceived of as influenced by any other consideration than justice and the public good. They also are in a position to do much toward making the law uniform in all common law countries."

**REVIEW OF CURRENT ENGLISH CASES.**(Registered in accordance with the Copyright Act.)

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**PRACTICE — ACTION — DISCONTINUANCE BEFORE APPEARANCE — COUNTERCLAIM.**

*The Salybia* (1910) P. 25. This, although an admiralty action, it may be useful to note as settling that where an action is discontinued before appearance, it is at an end for all purposes, and it is not thereafter open to the defendant to file a counter-claim. After the action had been discontinued the defendant applied to compel the plaintiff to deliver "a preliminary act," which appears to be the equivalent in admiralty for a statement of claim in an ordinary action, in order that the defendants might be able to deliver a counterclaim, but Bigham, P.P.D., held that the defendant had no such right under the Rules.

**ADMIRALTY—COLLISION—NEGLIGENCE OF DEFENDANTS' SERVANT CAUSING ORIGINAL DAMAGE—SUBSEQUENT NEGLIGENCE OF PLAINTIFFS' SERVANT CAUSING LOSS—CONTRIBUTORY NEGLIGENCE.**

*The Egyptian.* (1910) P. 38. In this case which was an admiralty action to recover damages for a collision, the facts were as follows. The defendants' vessel was so negligently handled by her temporary master in taking up her berth at a dock, as to cause a collision with the plaintiffs' vessel moored at the dock. After the collision, and knowing that it happened, the temporary master of the defendants' vessel went on board the plaintiffs' vessel and resumed his duties there as a watchman, but negligently failed to discover that owing to the collision water was entering the plaintiffs' vessel, and in consequence took no steps to prevent the inflow which he might have done; and owing to this neglect the vessel sank. In these circumstances Deane, J., held that the defendant was liable for all the damage, but the Court of Appeal (Lord Alverstone, C.J., and Buckley and Kennedy, L.J.J.), held that though the defendant was liable for the initial damage caused by the collision, he was not liable for the damage caused by the sinking of the vessel, which was due to the omission of the plaintiffs' servant to take proper steps to prevent the inflow of water.

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TRADE MARK—DISTINCTIVE MARK—“PERFECTION”—“ADAPTED TO DISTINGUISH”—USER—EVIDENCE—TRADES MARK ACT, 1905 (5 EDW. VII. c. 15), s. 9(5)—(R.S.C. c. 71, s. 11).

*In re Crosfield* (1910) 1 Ch. 118. This was an appeal from the registrar of trade marks for refusing to register the word “Perfection” as applied to soap as a trade mark. The applicants gave evidence that up to January, 1907, the applicants had used the word in conjunction with their name and two pyramids, with a caution that the genuine tablet of the soap bore the name and pyramids, and they also shewed that the word “Perfection” alone had come to denote their soap exclusively over a large extent of England and Wales, as distinguished from that of other makers. The registrar refused registration and Eady, J., upheld his decision being of the opinion that there was nothing in the word itself “adapted to distinguish” the applicants’ soap, and the fact that its use within large areas of the United Kingdom had rendered it distinctive of the applicants’ soap to many persons in those areas, though not so to many others, and scarcely to anyone outside of those areas, was not sufficient to make the mark “distinctive” or “adapted to distinguish” within the meaning of the statute (see R.S.C. c. 71, s. 11), and this conclusion was affirmed by the Court of Appeal: see next case.

TRADE MARK—REGISTRATION—DISTINCTIVE WORD—LAUDATORY EPITHET — GEOGRAPHICAL NAME—PHONETIC SPELLING OF COMMON WORDS—TRADES MARK ACT, 1905 (5 EDW. VII. c. 15), s. 9(5), ss. 11, 14—(R.S.C. c. 71, s. 11).

*In re Crosfield* (1910) 1 Ch. 130. This is an appeal from the judgment of Eady, J., in the preceding case, and also from the judgment of Warrington, J., *In re California Fig Syrup Co.* (1909) 2 Ch. 99, noted, ante, vol. 45, p. 597, and also from the judgment of Eve, J., *In re Brock*. The facts in the first of these cases are sufficiently stated in the preceding note, and it will suffice to say that the Court of Appeal affirmed the decision. In the second case the application was to register as a trade mark the words “California Syrup of Figs” as applied to an aperient medicine of which registration had been refused by Warrington, J. In this case the Board of Trade had referred the matter to the court. The evidence established a *prima facie* case of the words having become identified by long use with the goods of the applicant and the Court of Appeal overruling Warrington, J., held that the application ought to be allowed to proceed.

In the third case the word sought to be registered was "Orl-woola" as applied to woollen goods made by the applicants. Eve, J., had allowed the registration, but the Court of Appeal considered that the word was merely a phonetic spelling of the words "all wool" which could not themselves be registrable, and in the opinion of the Court could not be made registrable by spelling them according to the orthography of "Josh Billings."

**MARRIED WOMAN—SETTLEMENT—GENERAL POWER TO APPOINT BY WILL—NON-OCCURRENCE OF EVENT ON WHICH POWER WAS TO ARISE—EXERCISE OF POWER DURING COVERTURE—MARRIED WOMEN'S PROPERTY ACT, 1893 (56 & 57 VICT. c. 63), s. 3—WILLS ACT, 1837, s. 24—(R.S.O. c. 128, s. 26).**

*In re James, Hole v. Bethune* (1910) 1 Ch. 157. By a marriage settlement property was settled upon trust for husband and wife for life, and if there should be no children and husband should predecease wife, then after his death in trust for the wife absolutely. If the husband survived the wife, she had a general power to appoint notwithstanding coverture (but subject to her husband's life interest), and in default of appointment the trust funds were to go to the wife's next of kin on her husband's decease. The husband predeceased the wife, but during coverture she made a will appointing the trust fund, and the question was whether such appointment took effect. By the Married Women's Property Act of 1893, a will of a married woman made during coverture does not require to be republished on her becoming discovert (see R.S.O. c. 128, s. 26), and Joyce, J., held that the will must be held to operate on any property the testatrix was entitled to at the time of her death, and as at the time of her death she was absolutely entitled to the fund, the will was an effective disposition of it.

**CHARITY—SCHEME—APPLICATION OF INCOME—CHARITY OUT OF JURISDICTION.**

*In re Mirrlee's Charity, Mitchell v. Attorney-General* (1910) 1 Ch. 163. A testatrix who was born in Scotland, but who at the time of her death was domiciled in England made her will bequeathing £20,000 to charity. By a scheme settled by the court it was provided that the income of the fund should be applied for the benefit of a particular hospital in England, "or such other medical charity or charities of any kind, school or teaching whatsoever, and partly or exclusively to one or other of such

objects as the trustees may in their uncontrolled discretion from time to time determine." The trustees applied for leave to apply the income to medical charities in Scotland, but Joyce, J., held that the charity must be administered, and the scheme carried into effect, within the jurisdiction of the court, and could not be applied to any charities in Scotland.

WILL—CONSTRUCTION—GIFT TO A., B., C., AND THEIR CHILDREN—

GIFT OVER ON DEATH OF A., B., C., LEAVING NO CHILDREN—

REALTY—CHATTELS REAL—EXECUTORY BEQUEST OR LIMITATION OVER ON DEATH OF PARENT—RULE IN WILD'S CASE.

*In re Jones, Lewis v. Lewis* (1910) 1 Ch. 167 may be considered as an illustration of the benefit which sometimes accrues to the profession "from the jolly testator who makes his own will." In this case he succeeded in so framing his testamentary wishes as to raise sundry nice points, and though probably blissfully ignorant of the rule in *Wild's* case, or the intricacies of the law respecting substitutional gifts, or gifts in succession, or executory devises and bequests, yet he nevertheless managed to stumble into them in such an inartificial way that no meaning could be given to his intentions without the assistance of a court of law. By the will in question leasehold and real estate were given to his wife for life and after her death "whatever may be left" after discharge of all claims against the estate, was given to his children in the following proportions 2-5 to his son and 3-5 to his two daughters in two equal shares, "and to the child or children of the three said children. In case of any of my children dying and bearing no legal issue, the share or shares of those dying to be given to the surviving child or children of such as will be dead—my daughters' and granddaughters' shares to be independent and free from all husbands." His wife survived the testator; only one of the grandchildren was born during her life. An application was made by the three children for the determination of their interests. It was contended that under *Wild's* case they took a fee tail in the realty, and as to the personalty that the gift to the children was concurrent, and consequently only the grandchild born in the lifetime of the tenant for life was entitled to share, and those children who had no issue at the death of the tenant for life were consequently entitled absolutely. Joyce, J., however, held that no child was entitled at present to his or her share absolutely, but that each share upon the death of the child was subject to an executory bequest or limitation over to his or her

children, and also subject to the gift over in case of any child dying leaving no issue, the meaning of which would have to be decided when, if ever, the event happened. He also held that the rule in *Wild's* case (1599) 6 Rep. 16b has no application where the gift or devise to the children (here the grandchildren of the testator) would, without reference to the rule, be a gift or devise in succession to, and not concurrently with, their parent.

**VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—DEFAULT IN PAYMENT BY PURCHASER—FORFEITURE OF DEPOSIT—FORM OF JUDGMENT—DEFICIENCY ON RESALE—PRACTICE.**

*Shuttleworth v. Clews* (1910) 1 Ch. 176 was an action for specific performance of a contract for sale of lands. The purchaser had paid a deposit of £700 on his purchase money, and the plaintiff prayed that in the event of his making default his deposit should be declared forfeited, and for a resale of the property, and that he should be ordered to pay the deficiency, and a question arose as to what would be the proper form of judgment in such a case, and whether in the event of the resale the purchaser would be entitled to credit for the deposit in estimating the deficiency. Joyce, J., held that the purchaser would in calculating the deficiency be entitled to credit for the deposit, and intimates that in his opinion the order in *Griffiths v. Vezey* (1906) 1 Ch. 796 was improperly drawn.

**COMPANY—ASSOCIATION NOT FOR PROFIT—ARTICLES OF ASSOCIATION—CONSTRUCTION—ULTRA VIRES — PENSION TO RETIRED SERVANT.**

*Cyclists' Touring Club v. Hopkinson* (1910) 1 Ch. 179. The plaintiffs in this case was a company organized under the Companies Act not for profit. By its articles of association it was provided, as a condition of obtaining a license, as follows.

The income and property of club whencesoever derived, shall be applied solely towards the promotion of the objects of the club as set forth in this memorandum of association, and no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus or otherwise howsoever by way of profit to the members of the club. Provided that nothing therein contained shall prevent the payment in good faith of remuneration to any officers or servants of the club, or to any member of the club or other person in return for any services actually rendered to the club. On a vote of a majority of the members a pension

of £150 a year was voted to a retired secretary of the club, by way of gratuity. Before acting on the vote the council desired to be assured that the payment would be *intra vires* of the club, and hence the present action was instituted, and the point was brought up for adjudication in a summary way by originating summons, a member of the club being made the defendant. Eady, J., determined that the payment would be *intra vires*.

**STOCK EXCHANGE—BROKER AND CLIENT—PURCHASE OF SHARES—  
CARRYING OVER—ACCOUNT RENDERED BY BROKER TO CLIENT—  
OMISSION BY BROKER TO GIVE PARTICULARS OF HIS CHARGES—  
EQUITABLE MORTGAGE— IMPLIED POWER OF SALE—REASON-  
ABLE NOTICE TO MORTGAGOR.**

*Stubbs v. Slater* (1910) 1 Ch. 195 was an action brought against a stock exchange broker. The plaintiff had employed the defendant to buy shares for him on what in this country is called "margin." The defendant bought the shares, which were from time to time "carried over" on successive settling days. The defendant from time to time rendered to the plaintiff a statement of the charges for carrying over, which were stated to be 8½d. "net." This sum included, besides the jobber's charge, a sum for the broker's own services, but as Neville, J., found the plaintiff did not know what it meant, or that it included the charges from time to time paid to the jobber for carrying the shares over. The plaintiff failed to pay the balance against him in October, 1905, and on the defendant pressing for payment, the plaintiff thereupon deposited with the defendant a certificate for 390 gas shares with a transfer in blank. The fortnightly balances continuing adverse to the plaintiff, in January, 1906, the defendants closed the account with a balance of £69.10s. against the plaintiff and then sold the gas shares for £162.10s. The plaintiff claimed that the charges made by the defendants were excessive and improper in that they included charges for the defendant's services which were not specified or disclosed. Neville, J., found on this point in favour of the plaintiff holding that where an agent seeks to charge his principal for his services the principal must be distinctly informed of the charge, and that the mixing up of his charges with sums paid to another person will not do. He also held that the defendants were justified in selling the whole of the shares for which there was no market, but which could only be sold as an opportunity might arise. He, therefore, held that the plaintiff was not entitled to any relief on that account, but that he was entitled to a refund

of £17.17s. 10d. the broker's charges, or might have a reference if he preferred it to ascertain the amount thereof, subject to the risk of costs.

**COMPANY—WINDING-UP—CONTRIBUTORY—TRANSFER OF SHARES  
TO ESCAPE LIABILITY—BONA FIDES—EQUITIES BETWEEN TRANS-  
FEROR AND TRANSFeree.**

*Re Discoverers' Finance Corporation* (1910) 1 Ch. 207. This was an application by the liquidators of a company being wound up to rectify the list of contributors by substituting the name of Lindler for that of Schneider in respect of 2,000 shares of £1 each, on which only 7/6 per share had been paid, on the ground that Lindler had transferred the shares in question to Schneider who was a "man of straw" in order to escape liability for calls. It appeared in evidence that in 1904 Lindler, from something he heard, became anxious to get rid of his liability on his shares and tried to find a purchaser in England and failed, and then wrote to a correspondent in Germany to find him a purchaser who brought the matter before one of his employees named Schneider, who agreed to purchase the shares for 100 marks. Lindler on being informed of this filled up a transfer to Schneider stating the consideration to be £5, this transfer was executed by Schneider and returned to Lindler who sent it in for registration, the directors were not bound to register it, but they did so on its being passed by the board of directors in February, 1905. In 1906 the company went into voluntary liquidation. It appeared that the consideration for the transfer had never been paid or asked for. The explanation being that shortly after the transfer Schneider met with an accident which had crippled him for life, but the transfer was an out and out transfer without any undertaking that Schneider should be indemnified by Lindler or anyone else against any loss. In these circumstances Neville, J., held that the transfer was valid, and unimpeachable by the liquidators.

**WILL—CONSTRUCTION—ABSOLUTE GIFT FOLLOWED BY CODICIL  
DIRECTING USE OF LEGACY FOR CHARITABLE PURPOSE—PRECA-  
TORY TRUST—"I WISH."**

*In re Burley, Alexander v. Burley* (1910) 1 Ch. 215. This was an application for the construction of a will. The testatrix gave a legacy of £2,300 to Colonel Russell. By a codicil dated the same day she declared "I wish Colonel Russell to use £1,000

part of the legacy given to him by my above will for the endowment in his own name of a cot in a named hospital, and to retain the balance . . . for his own use." By a second codicil made two years later the testatrix declared, "I wish Colonel Russell after endowing the cot as provided in the first codicil, to use the balance of the legacy given to him by will for such charitable purposes as he shall in his absolute discretion think fit." Colonel Russell renounced and disclaimed the whole legacy of £2,300. It then became a question whether or not a good charitable trust had been created, and Joyce, J., decided that as to £1,000 there was a good charitable trust for the endowment of the cot in the hospital, and as to £1,300 there was a valid and effectual trust created for charitable purposes, notwithstanding anything that has been said in the later cases regarding precatory trusts.

**WILL—CONSTRUCTION—ABSOLUTE GIFT—GIFT ON CONDITION—  
PRECATORY TRUST FOR CHARITY—"I SPECIALLY DESIRE."**

*In re Conolly, Conolly v. Conolly* (1910) 1 Ch. 219 a similar question to that raised in the last case also arose. The testator gave to his sisters Anne and Louisa equally, the rest of his stocks and shares, subject to a legacy to E. R. Conolly of £1,000, and he subsequently stated, "I specially desire that the sums herewith bequeathed shall with the exception of the £1,000 to E. R. Conolly, be specifically left by the legatees to such charitable institutions . . . as my sisters may select, and in such proportions as they may determine." It was argued that this latter clause had the effect of cutting down the previous absolute gift to the sisters to a life estate subject to a trust after their lives for charity. Joyce, J., came to the conclusion that in this case no valid trust was created. He points out in the first place that no "sums" strictly speaking were bequeathed to the sisters, that "sums might mean stocks and shares or only what they take in money which created an uncertainty as to what really was meant. He also points out that a further uncertainty existed owing to the fact that the property was to be left to such charitable institutions, etc., "as my sisters (i.e., the two) may select and in such proportions as they may determine," which, however, he thought might be taken to mean that each solicitor was to determine as to her own particular share only. But apart from these considerations, he held that the words used were not sufficient to create a precatory trust according to the recent cases, which he considered had established that an absolute

gift is not to be cut down to a trust estate, by the mere expression of a wish that the donee shall leave the property to some charitable purpose.

**INSURANCE, MARINE—DEVIATION CLAUSE—AGREEMENT THAT VESSEL SHALL BE INSURED AT A PREMIUM TO BE ARRANGED—SUBJECT TO “DUE NOTICE” OF DEVIATION—NOTICE OF DEVIATION GIVEN AFTER LOSS.**

*Menz v. Maritime Ins. Co.* (1910) 1 K.B. 132. This was an action on a policy of marine insurance which contained a clause providing that in the event of the vessel making any deviation such deviation shall be held covered at a premium to be arranged “provided due notice be given by the assured on receipt of advice of such deviation.” The vessel made two deviations and in the course of the second deviation was stranded in February, 1908, and became a total loss. The plaintiff had no notice of either deviation until April, 1908, when they were informed of the second deviation and at once gave notice of it to the defendants. They were not informed of the first deviation until May, 1908, and not thinking a notice of it to be of any importance in the circumstances they did not give any notice of it to the defendants till many months later. The question, therefore, was whether a notice given after loss was a sufficient compliance with the condition. The defendants contended it was not “due notice” because it was impossible for them when it was given to protect themselves by reinsurance. But Hamilton, J., declined to give effect to that argument, and on the contrary held that the notice given was a sufficient compliance with the condition.

**CRIMINAL LAW—FALSE PRETENCES—EVIDENCE OF OTHER FRAUDS—ADMISSIBILITY.**

*The King v. Fisher* (1910) 1 K.B. 149. In this case the defendant was indicted for obtaining a pony and cart under false pretences on June 4, 1909. Evidence was admitted that on May 14, 1909, and on July 3, 1909, the prisoner had obtained provencher from other persons by false pretences, different from those alleged in the indictment. The prisoner was convicted, but on a case stated by the justices, it was held by the Court of Criminal Appeal (Lord Alverstone, C.J., and Channell and Coleridge, JJ.), that such evidence ought not to have been received. Channell, J., who delivered the judgment of the court, admits that the question how far evidence is admissible of other criminal acts on the

part of an accused, is not always easy to decide. He, however, considers the principle is clear that the prosecutor is not allowed to prove that the prisoner is guilty of the offence charged by giving evidence that he is a person of bad character and in the habit of committing crimes, because that is equivalent to asking the jury to convict the prisoner of the offence charged because he has committed other offences. But if the evidence of other offences does go to prove that he did commit the particular offence charged then it is admissible. For example, on a charge of embezzlement, if the defence is that the failure to account is due to a mistake of the prisoner, evidence would be admissible to prove other instances of the same kind, because that would tend to shew that the prisoner's default was not due to mistake; so, also, where a prisoner obtains goods by paying for them with a worthless cheque, proof of his having obtained other goods by means of worthless cheques would be admissible—such evidence being permissible as negativing the fact of the accused having acted under a mistake.

**CRIMINAL LAW—PLEADING—RECEIVING STOLEN GOODS—OMISSION OF WORD “FELONIOUSLY”—COMMON LAW MISDEMEANOUR.**

*The King v. Garland* (1910) 1 K.B. 154. This was a prosecution in which the indictment alleged that the prisoner unlawfully received certain goods knowing them to have been feloniously stolen. It was objected on the part of the prisoner that the omission of the word “feloniously” after the word unlawfully rendered the indictment void in law. But the Court of Criminal Appeal (Lord Alverstone, C.J., and Channell and Coleridge, JJ.), held that the indictment was good as charging the commission of the common law misdemeanour of receiving stolen goods, and that though the evidence disclosed a felonious stealing within the Larceny Act, 1861, a conviction based on that evidence is by reason s. 12 of the Criminal Procedure Act, 1857, a good conviction for the common law misdemeanour, although by s. 91 of the Larceny Act, 1861, the receiving of goods feloniously stolen, is itself made a felony.

**NEGLIGENCE—PUBLIC SCHOOL—DANGEROUS DOOR SPRING—INJURY TO SCHOLAR—LIABILITY OF SCHOOL AUTHORITIES.**

In *Morris v. Carnarvon County Council* (1910) 1 K.B. 159, the plaintiff was a child of seven years and attended as a scholar a public school maintained and carried on under the authority of

the defendants. Being ordered by the teacher to leave the class room, the plaintiff passed through the door, which was a heavy swing door with a powerful spring, and which shut upon her fingers, causing her serious injury. The action was tried in a County Court, and judgment was given for the plaintiff, and on appeal to a Divisional Court (Darling and Phillimore, J.J.), the judgment was affirmed, the court holding that as the door was dangerous if used by young children, the defendants having invited the plaintiff to use it were liable at common law for the injury that resulted.

TRESPASS—JUSTIFICATION—ACT DONE TO STAY PROGRESS OF FIRE—  
PRESERVATION OF SPORTING RIGHTS.

In *Cope v. Sharpe* (1910) 1 K.B. 168, the defendant was gamekeeper of the owner of sporting rights over the land of the plaintiff. A fire occurred on the land in question which was covered with heather, and in order to extinguish the fire and prevent it from spreading so as to destroy the game on the land, the defendant burnt certain strips of heather in order that the fire might be checked when it reached such burnt strips. For so doing the plaintiff sued the defendant for trespass. The County Court judge held that the act was a trespass and gave judgment for the plaintiff, but the Divisional Court (Darling and Pickford, J.J.), were of the opinion that if the act in question was necessary for the preservation of the sporting rights of the defendant's master, it would be justified, and, as that fact was not found, a new trial was ordered.

NEGLIGENCE—SAVAGE ANIMAL—LIABILITY OF OWNER TO TRESPASSERS.

In *Lowery v. Walker* (1910) 1 K.B. 173 the Court of Appeal (Williams, Buckley, and Kennedy, L.J.J.) have affirmed, but not unanimously, the judgment of the Divisional Court in this case (1909) 2 K.B. 433 (noted, ante, vol. 45, p. 645), to the effect that the owner of a savage animal, which is kept in his field, which is traversed by strangers without license or leave is not liable to such strangers while so trespassing for injury caused to them by such animal. Buckley, L.J., dissented because he was of the opinion that the plaintiff was not a trespasser, but was in fact using the premises without objection of the defendant, and the defendant knew that persons so traversing the field were exposed to the risk of an attack from the animal in question.

SOLICITOR—LUNACY OF CLIENT—DETERMINATION OF SOLICITOR'S AUTHORITY—STEPS IN ACTION TAKEN BY SOLICITOR IN IGNORANCE OF DETERMINATION OF AUTHORITY—IMPLIED WARRANT OF AUTHORITY—LIABILITY OF SOLICITOR ACTING FOR DEFENDANT WITHOUT AUTHORITY FOR PLAINTIFF'S COSTS.

*Yonge v. Toynbee* (1910) 1 K.B. 215 deals with a question of great importance to solicitors. The plaintiff had sued the defendant for slander in December, 1908, and a firm of solicitors whom the defendant had in the previous August retained in anticipation of the action, had undertaken to appear for him, which they did, and subsequently delivered a defence setting up privilege. It subsequently came to the solicitor's knowledge in April, 1909, that in October, 1908, the defendant had been certified as of unsound mind and ordered to be detained. The solicitors then gave notice to the plaintiff's solicitors of the fact of the defendant's lunacy. The plaintiffs, thereupon, applied to strike out the appearance and defence as having been entered without authority, and for an order that the solicitors who had entered the same should pay all costs of the abortive proceedings. Sutton, J., made the order striking out the appearance and defence, but refused the order for costs against the solicitors, but the Court of Appeal (Williams and Buckley, L.J.J., and Eady, J.), held that on the authority of *Collen v. Wright* (1857), 8 E. & B. 647, the solicitors must be taken to have warranted their authority to act for the defendant, and the fact that they had acted bona fide and in ignorance that their authority had determined did not relieve them from liability to the plaintiffs for the costs occasioned to them by replying on each warranty.

PRACTICE—DISCOVERY—PRODUCTION OF DOCUMENTS—TRADE UNION—CORRESPONDENCE BETWEEN PLAINTIFF AND TRADE UNION—PRIVILEGE BETWEEN SOLICITOR AND CLIENT.

*Jones v. Great Central Ry.* (1910) A.C. 4. It is not often that a mere point of practice is carried to the House of Lords, and it is a pity where one is thought to be of sufficient importance to carry to that august tribunal that the case is not reported in such a way that the decision can be clearly understood. We confess that we find difficulty in understanding exactly what was decided in the present case. The plaintiff was a former employee of the defendant company, he was dismissed and considered himself aggrieved thereby. He was a member of a trade union, and, as such, he was entitled to have the assist-

ance of the solicitor of the union in bringing an action for wrongful dismissal, provided he could satisfy the officials of the union that he had a reasonable ground of complaint. For the purpose of satisfying them on that point certain letters passed between the plaintiff and the officials of the union in order to furnish information by which the solicitor of the union should be enabled to conduct the action which the plaintiff desired should be brought. It would seem that the officials were satisfied and the solicitor of the union brought the action at the union's expense. So far as appears the union was not in any way a party on the record. On a motion for discovery the defendants claimed that the letters which had passed between the plaintiff and the union officials must be produced, but whether he was called on to produce both those which the plaintiff received as well as those he had written does not very clearly appear. The plaintiff claimed that they were privileged as being communications between solicitor and client, but the House of Lords (Lord Ladbroke, L.C., and Lords Macnaghten, James and Shaw), held that they were not privileged. One could understand that the plaintiff should be required to produce the letters he had received, but on what principle he could be called on to produce documents in the hands of a third party we are unable to see. If those documents had come to the hands of his solicitor while acting as solicitor for the plaintiff they would no doubt be producible, but if as would appear to be the case they came to the hands of the solicitor while acting for a third party (in this case the trade union), how can the plaintiff be required to produce them? We give it up. If the documents were in the hands of the solicitor as solicitor for the union we would imagine that the union might say "we object to your producing our documents."

DEFAMATION—LIBEL IN NEWSPAPER—PUBLICATION—ABSENCE OF INTENTION TO DEFAME PLAINTIFF.

*Hulton v. Jones* (1910) A.C. 20 is our old friend *Jones v. Hulton* (1909) 2 K.B. 444, which was noted, ante, vol. 45, p. 645, and which shews how dangerous it is for a newspaper writer with an exuberant fancy, to use the name of "Jones" when he wishes to invent some spicy and imaginary story concerning a fictitious person. For if a member of that numerous family were to arise and say he was thereby defamed the publisher might have to smart handsomely for his pains though wholly ignorant of even the existence of the plaintiff, and innocent of all intention to injure him. In this case the plaintiff was a bar-

rister, his Christian name was "Thomas," but he assumed the name of "Artemus," and he was known among his friends as "Artemus Jones." In the defendants' newspaper an article was published purporting to describe the doings of a Mr. Artemus Jones at Dieppe, in a manner very derogatory to his moral character. The writer of the story disclaimed all knowledge of the plaintiff's existence and intended to relate a purely fictitious story of a fictitious and non-existent person. The plaintiff, however, proved that his friends and acquaintances thought that the article referred to him, and he recovered a verdict of £1,750, which was upheld by the Court of Appeal, and has now been also upheld by the House of Lords (Lord Loreburn, L.C., and Lords Atkinson, Gorrell, and Shaw). The Lord Chancellor is careful to say that if the article had clearly indicated that it related to a fictitious person it would not have been libellous. The trouble with the writer of the article in question was that he lied too much like truth.

**ESTATE DUTY—FOREIGN BONDS PAYABLE TO BEARER—BONDS ACTUALLY WITHIN JURISDICTION.**

In *Winans v. Attorney-General* (1910) A.C. 27 the House of Lords (Lord Loreburn, L.C., and Lords Atkinson, Gorrell and Shaw), have decided that foreign bonds and certificates payable to bearer, and passing by delivery, and marketable on the London Stock Exchange, when physically situate within the United Kingdom at the death of the owner within the jurisdiction, are subject to estate duty under the Finance Act, 1894, although the owner was an American citizen domiciled in America. The appellant contended that the same principles which apply to legacy and succession duty, applied to the estate duty under the Finance Act, 1894 (57-58 Vict. c. 30), ss. 1, 2(2), but their Lordships held that they were not applicable, but that the principle on which probate duty was payable governed the case, and as Lord Shaw puts it, the estate duty has now absorbed probate duty, in other words what was formerly payable as probate duty is now payable as estate duty.

**INCOME TAX—RETURN OF INCOME—NEGLECT TO DELIVER A TRUE AND CORRECT STATEMENT—INCOME TAX ACT, 1842 (5-6 VICT. c. 35), ss. 52, 55—(ASSESSMENT ACT, 4 EDW. VII. c. 23, s. 21 (ONT.)).**

*Attorney-General v. Till* (1910) A.C. 50. In this case the respondent being required under s. 52 of the Income Tax Act of

1842 (see 4 Edw. VII. c. 23, s. 21 (Ont.)) to deliver a true and correct statement in writing of his gains and profits under schedule D, delivered an incorrect statement, not fraudulently (as the jury found) but negligently, that is to say, not to the best of his judgment and belief according to the rules. Lord Alverstone, C.J., who tried the action held that he was nevertheless liable to the penalty imposed by the Act, but the Court of Appeal (1909) 1 K.B. 694 reversed his decision. The decision of the Court of Appeal has now been reversed by the House of Lords (Lord Loreburn, L.C., and Lords Atkinson, Gorrell and Shaw), and the judgment of Lord Alverstone, C.J., restored.

**MASTER AND SERVANT—NEGLIGENCE—NEGLECT OF STATUTORY DUTY—EVIDENCE—BURDEN OF PROOF.**

*Britannic Merthyr Coal Co. v. David* (1910) A.C. 74. This was an appeal from a decision of the Court of Appeal granting a new trial, (1909) 2 K.B. 146 (noted, ante, vol. 45, p. 473). The plaintiff's husband was killed by an explosion caused by blasting operations conducted in breach of certain statutory rules. The point in issue was simply a question of procedure concerning the burden of proof. It was proved by the plaintiff that the operation which had resulted in the explosion had been conducted contrary to the statutory rules. Channel, J., who tried the action nevertheless directed the jury that it was also incumbent on the plaintiff to prove that the defendants had not done their duty in taking proper care of the miners. The House of Lords (Lords Halsbury, Ashbourne, Atkinson, Gorrell, and Shaw), while affirming the decision of the Court of Appeal that there should be a new trial, expressed dissent from some of the reasons which that court had given; but what particular reasons they refer to, are not specified.

**MASTER AND SERVANT—COMMON EMPLOYMENT—RISK INCIDENTAL TO EMPLOYMENT—NEGLIGENCE OF FELLOW SERVANT— IMPLIED TERM OF CONTRACT OF SERVICE.**

*Coldrick v. Partridge* (1910) A.C. 77 is the case in which the representative of a deceased employee claimed to recover damages from his employers, the death of the deceased having been occasioned owing to the negligence of the defendants' servants, who managed a private railway of the defendants which the deceased and other servants used in coming and going from their work. The defence of common employment was set up,

and held by the Court of Appeal to be an answer to the action, (1909) 1 K.B. 530 (noted, ante, vol. 45, p. 320); and this conclusion is now affirmed by the House of Lords (Lord Loreburn, L.C. and Lords Atkinson, Gorrell and Shaw). Their Lordships being of the opinion that it was an implied term of the contract between the deceased and the defendants, that he was to be at liberty to use the railway, and that the servants managing that railway were fellow servants of the deceased, notwithstanding they were engaged in a different department of the business carried on by the defendants, from that in which the deceased was employed.

**MINES AND "OTHER MINERALS"—DEPOSIT OF CHINA CLAY—EX-PROPRIATION BY RAILWAY.**

In *Great Western Railway Co. v. Carpalla U.C. Co.* (1910) A.C. 83 the House of Lords (Lords Macnaghten, Atkinson, Collins, Shaw, and Loreburn, L.C.) have affirmed the judgment of the Court of Appeal (1909) 1 Ch. 218 (noted, ante, vol. 45, pp. 197, 747), to the effect that a deposit of china clay comes within the terms "mines and other minerals," and as such excepted from lands conveyed to the defendant railway company, in pursuance of expropriation proceedings, china clay being in their Lordships' opinion clearly a "mineral," and not a part of the ordinary composition of the soil in the district. See *infra North British Railway v. Budhill Coal & S. Co.*, where it is held that a sandstone though having a special commercial value, yet being part of the ordinary rock of the district is not a mineral. It may be noted that judgment was given in that case on the 15th Nov., 1909, whereas the judgment in this case was not delivered till a month later.

**TRADE UNION—APPROPRIATION OF FUNDS OF TRADE UNION FOR SUPPORT OF PARLIAMENTARY REPRESENTATIVE—ULTRA VIRES—PUBLIC POLICY.**

*Amalgamated Society of Railway Servants v. Osborne* (1910) A.C. 87. This is the decision that has caused some adverse comment amongst trade unionists. It was decided by the Court of Appeal (1909) 1 Ch. 163 (noted, ante, vol. 45, p. 197), that it is ultra vires of a trade union to devote any part of its funds towards payment for the services of a member of parliament. The House of Lords (Lords Halsbury, Macnaghten, Hereford, Atkinson, and Shaw) have affirmed that decision, (1) because

there is nothing in the Trade Union Acts to indicate that parliament intended to confer power on such associations to collect and administer funds for political purposes, (2) because a rule of any such association purporting to give it power to raise money for the purpose of securing parliamentary representation is ultra vires. Lord James was of the opinion that a rule compelling the member of parliament to answer the whip of the labour party was ultra vires, as not being within the powers of a trade union. Lord Shaw considers it not only to be ultra vires, but also unconstitutional as interfering, or endeavouring to interfere, with the freedom of judgment of a member of parliament. As his Lordship puts it, although such a bargain would be void at law, and the member entering into it would be free to act as he saw fit, yet where a court of law is appealed to, to lend its authority to the recognition and enforcement of a bargain of that kind, it would be contrary to sound public policy so to do. The rest of their Lordships, however, refrain from discussing the constitutional aspect of the case.

**RAILWAY—EXPROPRIATION—EXCEPTION OF MINES OF COAL, IRON-STONE, SLATE OR OTHER MINERALS.**

*North British Railway Co. v. Budhill Coal & S. Co.* (1910) A.C. 116. The question discussed in this case is very similar to that in *Great Western Railway Co. v. Carpall C.C. Co.*, supra. In this case the question arises on the Scotch Railway Act which excepts from land which can be expropriated, "mines of coal, ironstone, slate or other minerals" unless the same be specially paid for; here the particular substance claimed to be excepted as a "mineral" was a bed of sandstone of a peculiar commercial value. It appeared that this formation was the ordinary rock of the district, and the House of Lords (Lord Loreburn, L.C., and Lords Atkinson, Gorrell and Shaw), on appeal from a Scotch Court, held, reversing the court below, that the sandstone was not a "mineral" and, therefore, not excepted. The various conflicting decisions of the courts on the question what substances are and what are not included in the term "mineral," referred to in the judgment of Lord Loreburn, L.C., seem to shew that the courts have been unable to arrive at any satisfactory decision as to what does constitute a "mineral," and their Lordships by the two decisions above referred to, seem to have contributed to make the confusion a little worse confounded. If they mean to lay down the rule that where a substance is part of the ordinary soil of a district it is not a "mineral," but where

it is exceptional it is not; this does not seem to be a workable rule. Lord Gorrell, on page 130, cites no less than six definitions of the word "mineral," all of which are more or less contradictory. He bases his conclusion on the ground that in ordinary parlance sandstone is not considered to be a mineral. But if we are to be governed by ordinary parlance then gas or oil are not usually considered to be "minerals," and yet they have been judicially held to be minerals: See *Re Ontario Natural Gas v. Smart*, 18 Ont. App. 626.

**LIABILITY OF BANKERS FOR ACT OF AGENT IN EXCESS OF HIS AUTHORITY—PRINCIPAL AND AGENT—NOTICE OF LIMITED AUTHORITY OF AGENT.**

*Russo-Chinese Bank v. Li Yau Sam* (1910) A.C. 174. This was an appeal from the Supreme Court of Hong Kong and involved a very simple point. The plaintiff in the action sought to recover from the defendants, a banking company, a certain sum which he had placed in the hands of the defendants' agent for the purpose of telegraph transfer through the defendants' bank, the agent had no authority to receive money without the express approval of the defendants, his business was simply to arrange the details of the proposed transaction, and the plaintiff had notice of this limitation of his authority. The money was misappropriated by the agent, and the plaintiff sought to make the defendants liable for the loss. The Colonial Court gave judgment for the plaintiff, but the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson and Collins), it is almost needless to say reversed that decision.

**PILOTAGE DUES**—R.S.C. 1886, c. 80, s. 2(b), ss. 58, 59, (R.S.C. (1906) c. 113, ss. 475, 477)—**CONSTRUCTION.**

*The St. John Pilot Commissioners v. Cumberland Ry.* (1910) A.C. 208. This was an appeal from the Supreme Court of Canada in which the principal point was whether a vessel having sails, but principally dependent for locomotion on being towed by a tug, was a "vessel propelled by steam," and as such exempt from pilotage dues, within R.S.C. 1886, c. 80, ss. 58, 59 (now R.S.C. (1906), c. 113, ss. 475, 477). The Judicial Committee (Lord Loreburn, L.C., and Lords Ashbourne, Collins and Gorrell, and Sir A. Wilson), differing from the courts below, held that the vessel was not propelled by steam, and was, therefore, not exempt as claimed.

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REPORTS AND NOTES OF CASES.

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## Province of Ontario.

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HIGH COURT OF JUSTICE.

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Teetzel, J.]

Ross v. TOWNSEND.

[Feb. 17.

*Costs—Scale of—Amount recovered—Investigation of accounts involving large sums—Jurisdiction of County Court—Con. Rule 1132—Set-off.*

Motion by the plaintiff for judgment on further directions and as to costs.

The plaintiff sued for \$505.30 for balance of salary and travelling expenses. Upon a reference directed at the trial, the master reported that the plaintiff was entitled to recover only \$152.85, of which the defendant had paid into court \$107.95, with a plea of tender before action.

TEETZEL, J.:—While the total accounts investigated by the master were large, the result of the report is that the plaintiff should have sued for a balance of \$152.85 only. The County Courts having jurisdiction to entertain and investigate accounts and claims of suitors, however large, provided the amount sought to be recovered does not exceed the sum prescribed by the Act, this claim could have been sued for in a County Court: *Bennett v. White*, 13 P.R. 149. In the result, the case as to costs is governed by Con. Rule 1132.

The order will, therefore, be, that the plaintiff is entitled to judgment against the defendant for \$152.85, including the amount paid into court, and costs on the County Court scale, subject to the set-off to which the defendant is entitled under Con. Rule 1132.

J. M. Telford, for the plaintiff. A. O'Heir, for the defendant.

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Divisional Court.]

[Feb. 24.

TORONTO FURNACE CREMATORY Co.'v. EWING.

*Sale of goods—Conditional Sales Act, s. 1—Name and address of manufacturer to be stamped upon manufactured article—Incomplete address—Insufficiency.*

Appeal by the plaintiffs from the judgment of Denton, junior judge of the County Court of York, dismissing an action in

that court, brought to recover a balance of \$165 alleged to be due to the plaintiffs from the defendant Ewing for furnace and fittings, and, in the alternative, for an order to remove the furnace.

The appeal was heard by CLUTE, LATCHFORD and SUTHERLAND, JJ.

CLUTE, J.:—The main question argued was as to whether there was a sufficient compliance with the statute (the Conditional Sales Act, R.S.O. 1897, c. 149), which provides (s. 1) that “the manufactured article shall have the name and address of the manufacturer . . . painted, printed, stamped or engraved thereon or otherwise plainly attached thereto.”

In the present case the plaintiffs’ name as incorporated is, “Toronto Furnace and Crematory Company, Limited.” They carry on business at 70 and 72 King Street East, Toronto. The words upon the plate attached to the furnace are as follows: “From Toronto Furnace and Crematory Co., Limited, 70 and 72 King Street East.”

It will be seen that, while the company’s name appears upon the plate, the company’s address is not given, unless it be implied from the name and the number and street where their business is carried on.

The defendants contend that the address should be given, notwithstanding that the word “Toronto” appears as part of the name of the company as incorporated . . .

I am of opinion that the Act has not been complied with, and that the judgment of the court below is right and must be affirmed. *Mason v. Lindsay*, 4 O.L.R. 365, followed.

*A. C. Macdonnell*, K.C., for the plaintiffs. *J. T. Loftus*, for the defendant Pearcey. *W. A. Proudfoot*, for the defendants the Northern Life Assurance Co.

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Master in Chambers.]

[Feb. 28.

*Jackson v. Hughes*.

*Foreign commission—Time for return—Practice—Application to suppress Commission evidence—Solicitor a partner of commissioner—Con. Rules 512, 522.*

Motion by the defendants, the Hughes Company, to set aside an ex parte order extending for two days the time for the return of the commission sent to take evidence at Dundee, Scotland, and to suppress the same.

**THE MASTER:**—The first branch of the motion was made under a misapprehension, as the time for the return is the date on or before which it must be executed and despatched by the commissioner. It does not mean the date at which it must reach the central office: see *Darling v. Darling*, 9 P.R. 560, a decision of the present Chancellor on appeal from the contrary opinion of the Master in Ordinary (Taylor): see Con. Rule 512.

As to the other branch, it is, so far as I know, or can ascertain from inquiries of the oldest inhabitants of Osgoode Hall, the first application of the kind in this province.

The ground taken is that the commissioner was a solicitor, and that his partner appeared on behalf of the plaintiffs on the execution of the commission.

It was contended that, as the commissioner had to administer the oath to the witnesses, our Con. Rule 522 should be applied. The cases on this rule are given in Holmestead & Langton's Judicature Act, at p. 727. That of *Wilde v. Crow*, 10 C.P. 406, seems adverse to the motion.

The following cases were also cited and relied on: *Fricker v. Moore* (1730), Bunbury 289, where the court suppressed the depositions because taken before the plaintiff's solicitor, who was one of the commissioners; *Re G. M. Selwyn* (1779), 2 Dick. 563, for similar reasons; *Sayer v. Wagstaff* (1842), 5 Beav. 462, where it was said by Lord Langdale, M. R., that a commissioner should not act as solicitor for either party after his appointment.

The practice in England at these dates, as at present, is set out in Odgers on Pleading, 5th ed., c. 17, p. 268 et seq. It is so entirely different from ours that the English cases have little, if any, application on the present motion. If it was known beforehand what questions were going to be put up to the witnesses, who would then have their answers settled beforehand by their solicitors and counsel, it would be clearly improper for the partner of a commissioner to act for either party or for such a commissioner to be named by the examining party. At p. 279 Odgers says: "The answers (to interrogatories) must be carefully drawn." So, too, objections may be taken to the interrogatories, and apparently they too are prepared in the same careful way. It would seem to follow from this radical difference in the English practice that objections which would be fatal there would have little or no weight here.

Mr. Arnoldi has been cross-examined on his affidavit, and I have seen the depositions. He states that he does not know if any member of the commissioner's firm had been acting as

the plaintiffs' solicitor in this matter or in any other, nor does he think it likely, but, as he has not a copy of the evidence, and the commission has not been opened, he cannot say what, if anything, they did.

I think, in these circumstances, the motion must be dismissed with costs to the plaintiffs in the cause, leaving the defendants to avail themselves of their right to make all valid objections at the trial.

*J. T. White*, for the applicants. *Williams* (Montgomery & Co.), for the defendant *Percy Hughes*, supported the motion. *H. S. White*, for the other defendants stood neutral. *F. Arnoldi*, K.C., for the plaintiff, shewed cause.

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## Province of Manitoba.

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### COURT OF APPEAL.

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Full Court.]

THOMSON v. WISHART.

[Feb. 21.

*Attorney and client—Agreement to share in amount to be recovered by suit—Law Society Act, R.S.M. 1902, c. 95, s. 65—Maintenance and champerty—What criminal laws of England introduced into Manitoba by s. 12 of the Criminal Code.*

Maintenance and champerty had become obsolete as crimes in England in 1870, and s. 12 of the Criminal Code, declaring that the criminal law of England as it existed on 15th July, 1870, in so far as it is applicable to the Province of Manitoba . . . shall be the criminal law of the Province of Manitoba, did not introduce the law of maintenance and champerty considered as crimes into that province. Consequently s. 65 of the Law Society Act, R.S.M. 1902, c. 95, allowing an attorney or solicitor to make an agreement with a client to be paid for his services by receiving a share of what might be recovered in an action is not ultra vires of the Provincial Legislature as trenching upon or intended as a repeal of any provision of the criminal law. Such an agreement, therefore, may be enforced in our courts.

*Dennistoun*, K.C., and *Young*, for plaintiff. *F. M. Burbidge*, for defendant.

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Full Court.]      **HOLLINGSWORTH v. LACHARITE.**      [Feb. 21.

*Contract—Consideration—Failure to complete contract—Thresher's Lien Act, R.S.M. 1902, c. 167.*

The plaintiff was employed to thresh the defendant's crops of wheat, oats and barley at prices agreed upon. He threshed all the wheat (over 2,500 bushels), but left 458 bushels of barley and 10 to 15 acres of oats unthreshed.

*Held*, that the promise of each party was the consideration for the promise of the other and that payment by the defendant was not intended to be conditional upon the threshing of all the crops, so that plaintiff had not, by leaving some of the work undone, forfeited his right to be paid for what he had done, or lost his right to seize under the Thresher's Lien Act, R.S.M. 1902, c. 167, a sufficient quantity of the grain he had threshed from which to realize the amount of his claim.

*Bettini v. Gye*, 1 Q.B.D. 187, followed.

*Hudson*, for plaintiff. *Coulter*, for defendant.

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Full Court.]      **ROSS v. MATHESON.**      [Feb. 21.

*Principal and agent—Commission on sale of land—Necessity to get purchaser bound in writing.*

When the agent has found a purchaser ready, willing and able to carry out the purchase for the price and on the terms stipulated for by his principal, he will be entitled to his commission, although he has not secured a deposit or got the purchaser bound by any writing, in a case when the principal, after being informed of the willingness of the purchaser to buy, simply ignored the agent and dealt directly with the purchaser by selling the land to him at the stipulated price less the commission.

*Howell*, for plaintiff. *Mackenzie*, for defendant.

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Full Court.]      **JACK v. STEVENSON.**      [Feb. 21.

*Animals running at large—Fences—Damages—Municipal Act, R.S.M. 1902, c. 116, ss. 643(b), 644(d).*

The power of a municipal council under sub-s. (d) of s. 644 of the Municipal Act, R.S.M. 1902, c. 116, to pass a by-law limiting the right of a land owner to recover damages for any injury

done by trespassing animals to cases in which the land is enclosed by a fence of the nature, kind and height required by the by-law should be held to be restricted to cases in which the animals go upon the land from some adjoining land where they have a right to be, and such by-law is no protection to the owner of animals trespassing from a highway, if the council has not passed a by-law, under sub-s. (b) of s. 643, for allowing and regulating the running at large of animals in the municipality. Am. & Eng. Enc., vol. 12, p. 1044, and Enc. of Law & P., vol. 2, p. 401, followed.

*F. M. Burbidge*, for plaintiff. *Hudson*, for defendant.

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Full Court.]

DALZIEL v. ZASTRE.

[Feb. 21.

*Animals running at large—Fences—Damages—Municipal Act, R.S.M. 1902, c. 116, ss. 643(b) and 644(d).*

Action for damages caused to plaintiff by defendant's cattle trespassing on his lands which were not fenced. Defendant relied on a by-law of the municipality, presumably passed under the powers conferred by sub-s. (b) of s. 643 and sub-s. (d) of s. 644 of the Municipal Act, R.S.M. 1902, c. 116, and declaring that "it shall be lawful for any person to permit his horses or cattle . . . to run at large in any season of the year . . . and no one shall be at liberty to claim damages against the owner of such horses or cattle running at large or doing damage unless he shall have surrounded his lands and premises with a lawful fence as defined by by-law of this municipality."

At the trial there was no by-law proved which showed what should constitute a lawful fence in the municipality, except one which related only to barbed wire fences.

*Held*, that the defence failed and the plaintiff was entitled to recover.

*Phillips*, for plaintiff. *Deloraine*, for defendant.

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Full Court.]

HAMILTON v. MACDONALD.

[Feb. 21.

*Vendor and purchaser—Pleading—Specific performance—Refund of money paid on purchase of land—Prayer for further and other relief.*

The plaintiff's statement of claim set forth a case for specific performance of an agreement of sale of land to the plaintiff's

assignor and the payment of two instalments of the purchase money. The relief claimed was specific performance of the contract and "such further and other relief as the nature of the case might require." No amendment of the pleadings was asked for or made.

*Held*, that, on the failure of the case for specific performance, the trial judge could not, under the prayer for general relief, properly make an order for repayment by the defendant of the money he had received on account of his sale, and that the action should be dismissed with costs, without prejudice, however, to the right of the plaintiff to claim such repayment in another action.

*Cargill v. Bower*, 10 Ch.D. 502, followed; *Labelle v. O'Connor*, 15 O.L.R. 519, distinguished.

*Haffner*, for plaintiff. *Macneil*, for defendant.

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#### KING'S BENCH.

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Macdonald, J.]

[Feb. 7.

GREAT WEST PERMANENT *v.* ARBUTHNOT.

*Mistake—Erection of house on wrong lot.*

The plaintiffs advanced money to A. to build a house on lot X. A., by mistake, built the house on lot Y with material bought on credit from B. B. then acquired the title to lot Y.

On discovering this, the plaintiffs stealthily removed the building to lot X, but B. moved it back again.

The former owner of lot Y knew nothing about the placing of the building upon it.

*Held*, that the building had become part of the realty in the hands of such former owner and that the plaintiffs were not entitled to an order requiring B. to return or remove the building to lot X, or permitting them to remove it themselves, or to any damages or other relief against B.

*Taylor*, K.C., for plaintiffs. *H. A. Burbidge and Hughes*, for defendants.

Macdonald, J.]

McPHERSON *v.* EDWARDS.

[Feb. 16.

*Practice—Amendment—Delay in applying for.*

An application by the defendant made in good faith in Chambers before the trial for leave to amend the statement of

defence should not be refused although there has been great delay in making it, only partially accounted for by negotiations for settlement, where no injury can be caused to the plaintiff by the amendment that cannot be compensated for in costs.

*Johnson v. Land Corporation*, 6 M.R. 527, and *Tildesley v. Harper*, 10 Ch. D. 393, followed.

*McLaws*, for plaintiff. *Card*, for defendant.

### United States Decisions.

**ACCIDENT INSURANCE.**—Failure to Follow Physician's Directions: No indemnity should be allowed for an insured under an accident policy on account of an extension of the injury occasioned by his negligence to follow directions of his physician. *Maryland Casualty Co. v. Chew*, Ark. 122 S.W. 642.

**ACCORD AND SATISFACTION.**—CHECKS: A debtor paying by check containing a condition held authorized to withdraw the condition prior to the acceptance of the check by certification. *Drewry-Hughes Co. v. Davis*, N.C. 66 S.E. 139.—Payment by Check: The retention of a check which was shewn by a letter and voucher which accompanied it to be in full payment of the account sued on, without any explanation, held a payment in full of the account. *Goodloe v. Empson Packing Co.*, Mo. 122 S.W. 771.

**AUTOMOBILES—LOOK AND LISTEN DOCTRINE IN REFERENCE TO STREET CROSSING BY PEDESTRIANS.**—The New York Supreme Court, in Appellate Division, has held that it is not contributory negligence as a matter of law for one not to look in both directions as he steps from the sidewalk to cross a street, because vehicles must keep on their proper side: *Brantley v. Jaeckel*, 119 N.Y. Supp. 107. The injury to the pedestrian was by an automobile proceeding at a rapid speed on the wrong side of the street. The rule as to looking both ways is distinguished from the case of one going on a railroad track, though one would not have to look but one way, it would seem, if the railroad was double-tracked. The court said: "It is no hardship upon owners of automobiles, which are travelling silently and without any signal of warning, as in this case, and on the wrong side of the street and close to the curb, to hold that the person in control of the car must be observant not only of what is directly in front

of it, but of pedestrians who are travelling on the sidewalk and who may step into the street in front of the car."

The automobile "honk" seems as much in judicial cognizance as the engine bell or the street car gong, and the public have the right for one to sound as much as the other. The plane upon which the three are, as dangerous machines, seems about the same, with rigidity of rule rather against the automobile. We know where a train or a street car has to be, and the New York court says we know where the automobile ought to be, and we can assume the existence of one fact as well as the other.

**BILLS AND NOTES.**—Insertion of Date: A bona fide holder without notice of a note held entitled to enforce it notwithstanding the fact that the payee inserted an improper date therein. *Bank of Houston v. Day*, Mo. 122 S.W. 756.—Sufficiency of Evidence: In an action on a note shewn to have its inception in fraud by an alleged holder in due course, the burden is upon plaintiff to affirmatively establish his good faith in the transaction. *Arnd v. Aylesworth*, Iowa 123 N.W. 1,000.

**BROKERS.**—Duty to Disclose Facts: Broker sending customer to his principal to negotiate directly, without communicating to the principal his knowledge that the customer was resolved to pay the price asked, held to forfeit any right to commission. *Carter v. Owens*, Fla. 50 So. 641.

**CARRIERS OF PASSENGERS.**—Injury to Passengers: A passenger cannot recover for mental suffering incident to an injury in the absence of a shewing of wanton or wilful disregard of his rights. *Caldwell v. Northern Pac. Ry. Co.*, Wash. 105 Pac. 625.—Wrong Date of Ticket: A passenger presenting a ticket with an erroneous date cannot enhance his damages by resisting the conductor's order to leave the train, nor because of force used in ejecting him. *Arnold v. Atchison, T. & S.F. Ry. Co.*, Kan. 105 Pac. 541.

**CONTRACTS.**—Consideration: Where a widow repudiated a contract to permit defendants to use certain land so long as they should support her, defendants, having had the use of the land prior to the repudiation, could not claim the value of their services. *Glass v. Hampton*, Ky. 122 S.W. 803.—Destruction of Subject Matter: A contract calling for the rendition of personal service by one is subject to the implied condition that, in the event of his death, further performance on both sides will be excused. *Levy v. Caledonian Ins. Co.*, Cal. 105 Pac. 598.—

**Validity:** A contract for the sale of pianos for resale to the public by the buyer under a word contest held not invalid as contrary to public policy. *D. H. Baldwin & Co. v. Moser*, Iowa 123 N.W. 989.

**CRIMINAL LAW.**—**Opinion Evidence:** One may be qualified by study without practice, or by practice without study, to give an opinion on a medical question. *Copeland v. State*, Fla. 50 So. 621.

**CRIMINAL TRIAL.**—**Discharge of Jury:** The discharge of the jury in a capital case for illness of the judge held a discharge from necessity, so that accused was not placed in jeopardy. *State v. Vernado*, La. 50 So. 661.—**Misconduct of Jury:** Jurors speak through their verdict, and cannot violate secrets of the jury room and tell of partiality or misconduct that transpired there, nor speak of methods which induced to produce the verdict. *State v. Linn*, Mo. 122 S.W. 679.—**Witnesses:** Where accused was a witness in his own behalf, the court erred in charging that in general a witness who is interested will not be an honest, candid and fair as one who is not. *Holmes v. State*, Neb. 123 N.W. 1043.

**CROPS.**—**Contracts:** Party furnishing seed wheat for a fourth of the crop held to have a right thereto superior to a mortgage given by the other party on the entire crop. *Dobson v. Covey*, Kan. 105 Pac. 519.

**DAMAGES.**—**Warning Against Sympathy:** In an action for personal injuries to plaintiff, and for the death of his wife and three children from an explosion of illuminating oil, held that the jury should have been cautioned not to allow questions of sympathy or sentiment to enter into their deliberations. *Chapman v. Pfarr*, Iowa 123 N.W. 992.

**EASEMENTS.**—**Ways of Necessity:** Where there was no outlet to the public highway from land sold, the law implied a grant of a reasonable right of way from the remainder of the vendor's land to the vendee, and subsequent grantees of the vendor took subject to such right of way. *Roland v. O'Neal*, Ky. 122 S.W. 827.

**FIXTURES.**—**Intent in Making Annexation:** In ascertaining the intention to make machinery or other articles permanently a part of a factory building, adaptability to the work or business is important, and if necessary thereto, or to the purpose for which the building was designed and used, or a convenient ac-

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cessory, or commonly employed, intention to annex permanently may be inferred. *Banner Iron Works v. Aetna Iron Works*, Mo. 122 S.W. 762.

**MASTER AND SERVANT.**—Negligence: The general rule against the recovery for injuries sustained by persons while attempting to get on or off a moving train held not to apply with absolute strictness to "train hands," brakemen, and the like. *Reeves v. North Carolina Ry. Co.*, N.C. 66 S.E. 133.—Safe Place to Work: A servant held authorized to assume that his master or servants employed to do repair work had protected a hole in the floor made by the servants while doing the repair work. *Shives v. Eno Cotton Mills*, N.C. 66 S.E. 133.—Assumption of Risk: Where two employees are working together in the performance of a common task, and the inferior servant is injured by the negligence of the superior in the performance of an act incident to the common employment, the master is not liable as the risk ordinarily incident to the employment was assumed. *English v. Roberts, Johnson & Rand Shoe Co.*, Mo. 122 S.W. 747.

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## Book Reviews.

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*A Treatise on American Advocacy.* By ALEXANDER H. ROBBINS.  
St. Louis, Mo.: Central Law Journal Company.

This interesting book is a great improvement on Harris' "Hints on Advocacy" on which it is founded. Mr. Harris' work, as the title implies, was discursive and unsystematic; and it contained on the one hand, much that had no bearing on American practice, while on the other, it omitted much that the practitioner desired to know. Mr. Robbins, in correcting these defects, has exhibited the cardinal requisite of every expository treatise, namely, a logical arrangement and division of the subject matter.

Step by step the author conducts us in orderly progression through the various operations with which the advocate has to deal, preparation for trial, opening the plaintiff's case, examining in chief, cross-examination, re-examination, summing-up the defendant's case, and the plaintiff's reply. Then follow some

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very instructive chapters on the conduct of a criminal prosecution and defence, on the various classes of untruthful witnesses, on tact and tactics, legal ethics, etc. The author deals throughout with fundamental principles and with rules based upon the practise and precept of the most eminent advocates. Thus the rules followed by the late Sir Charles Russell are given in his own words as follows: "If you ask me to reduce the common habit of my life to formula, I will tell you that I have only four rules to guide me in preparing my work—first, to do one thing at a time, whether it is reading or eating oysters, concentrating such faculties as I am endowed with upon what I am doing at the moment; second, when dealing with complicated facts, to arrange the narrative of events in the order of time. My third rule is never to trouble myself about authorities supposed to bear on a particular question until I have accurately and definitely ascertained the precise facts; and, lastly, I try to apply the judicial faculty to the case before me, in order to determine what are its strong and weak points, and to settle in my own mind on what the issue depends."

Success in advocacy, as in every other art that deals with men, depends upon a knowledge of human nature and upon tact, a sort of refined common sense, a certain delicacy of perception and feeling which the advocate brings to the complex problems with which he has ever to deal. An advocate may by practice alone and without instruction, learn the principles and rules of the art; but he will make many mistakes and waste a great deal of time which might have been avoided if he had the opportunity to read a work such as this of Mr. Robbins', which is indeed a condensed summary of the experience of the best advocates.

We can heartily commend this admirable work to the notice of students as well as to practitioners of wider experience. It cannot but have a good influence in upholding the best traditions of the profession; in avoiding prolixity and waste of time in the conduct of trials which are crying evils in our courts; and on the whole it will do much to make better advocates, and thus more thoroughly secure and safeguard the rights of those who invoke the intervention of the law.

## Bench and Bar.

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### *JUDICIAL APPOINTMENTS.*

The Honourable James Thompson Garrow, of the city of Toronto, in the Province of Ontario, a justice of appeal of the Supreme Court of Judicature for Ontario, to be a local judge in Admiralty of the Exchequer Court in and for the Toronto Admiralty District. (March 1.)

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His Honour Hugh O'Leary, judge of the District Court of the Provincial Judicial District of Thunder Bay, in the Province of Ontario, to be a Surrogate judge in Admiralty of the Exchequer Court for that portion of the Toronto Admiralty District comprised in the Territorial Districts of Thunder Bay and Rainy River in the said Province of Ontario. (March 7.)

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## Flotsam and Jetsam.

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### *THE LAW OF THE AIR.*

The recent successful attempts at aviation open up a new and interesting field of legal inquiry. In the not distant future the aeroplane is likely to become a common means of transportation. This will necessitate the enactment of laws defining the relative rights of those who, Ariel-like, traverse the viewless pathway of the air, and of those terrestrial dwellers whose rights of person and property are likely to be infringed.

The St. Joseph (Mo.) *Press* states that Governor Hughes, of New York, believes that legislation will soon be necessary to control airships, and favours the prompt enactment of laws defining the right of aeroplanes to fly over others' property, and restricting or regulating the carrying of passengers.

Chief Justice Baldwin, of the Connecticut Supreme Court, recently lectured on this subject before the Yale Law School, holding that the common-law ownership theory would have to be modified to meet the conditions of modern progress. The theory of the common law has been that owners of the soil own all that is directly above and directly beneath their property, to an indefinite extent. On this theory, if a man owns all the

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atmosphere above him, no other man has a right to cross it with aeroplane or dirigible balloon without his consent. It would be trespass. Such machines are now very few in number, and are quite welcome to go where their owners will, but in time they may become numerous and develop unsuspected dangers. One a year flying over a man's house might be a negligible menace, but forty or fifty a day, with ropes dangling, ballast falling, anchors hanging, motors in danger of exploding, and the whole machine liable to drop and set fire to or smash crops or dwellings,—would be an entirely different matter.

Justice Baldwin thinks that a landowner's control of the air above his property must be limited to the exclusion only of that which may be a danger to him or an injury to his property. In a word, he cannot stop the flying machines, but if they should damage his trees, inconvenience or sicken his family by the smoke or smell, imperil his safety, or injure him, he would have cause for action and would be able to get redress. Existing laws would probably uphold claims for injuries thus inflicted, but the conditions of aero-navigation are so unstable and uncertain that very carefully prepared laws will be needed to define the rights and privileges of all parties.—*Case and Comment.*

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#### HUMOUR OF THE LAW.

The late Judge Hamlin, former Attorney-General of Illinois, was once engaged in the trial of a cause before a judge who was not inclined to tolerate tardiness on the part of attorneys. When he adjourned court at noon, he took occasion to impress upon the lawyers that court would reconvene at 1.30 o'clock exactly. He was almost speechless with rage when Mr. Hamlin walked into the court room shortly after 2 o'clock, apparently oblivious of any offence.

"Judge Hamlin," exploded the indignant and outraged court, "your violation of the instructions of this court is most reprehensible. Orders issued from this bench must be obeyed. What do you suppose the people elected me for?"

"Well, judge," drawled Hamlin, his eyes twinkling with merriment, "that matter always has been a mystery to me."

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## *THE RETIREMENT OF THE HON. MR. JUSTICE OSLER.*

By the retirement of Mr. Justice Osler from the Bench, the province will lose one of its most valuable and erudite judges, and one that it can ill afford to spare. At the same time we heartily congratulate the learned judge that having served the province and his sovereign so faithfully and well for 31 years, he is able, while still in the full possession of his health and faculties, to withdraw from the Bench, and has not been compelled to wait until diminished powers have rendered him less efficient, and we trust he may for many years enjoy during the remainder of his lifetime that *otium cum dignitate* which he has so well earned.

The learned judge, as is well known, is a member of a family of whom at least three other members have gained distinction for intellectual capacity of a high order. His brother, the late Mr. B. B. Osler, Q.C., whose premature death is still mourned, was an advocate of conspicuous merit, whose brilliant abilities were not in any wise marred by that subtle humour which was also one of his distinguishing characteristics, a quality, too, which is equally remarkable in Professor Osler, the learned Regius Professor of Medicine, but which does not seem to be possessed to the same degree by either Mr. E. B. Osler, the popular member for Toronto, or the learned judge of whom we speak. But if lacking in that faculty of playful humour which has distinguished two of his brothers, Mr. Justice Osler was and is the possessor of qualities which have enabled him to be an ideal judge.

There are judges whose sense of duty does not permit them to indulge in any vagaries for gaining popular attention, who are content to apply the best faculties of their minds to the elucidation and vindication of sound principles of law and justice, who do not regard suitors or witnesses as proper targets either for

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wit or sarcasm, but are content that justice shall be so administered by them, not in a flashy, but in an entirely modest and impartial way, and so far as it is humanly possible, so as to bring conviction of its intrinsic merits home even to the unsuccessful litigant, and after all it is really one of the most important duties of a judge not only to do right, but to convince, if it may be, even the litigant who fails, that right has been done.

Judging as far as we can from external appearances, we should say that Mr. Justice Osler must have set some such ideal of duty before him in the discharge of his judicial functions. No judge on the Bench was less conspicuous than he. He has never sought to attract attention to himself. His manner has been always modest and rather retiring and yet no judicial deliverance has commanded more attention or respect than his.

On the Bench he has been ever courteous and attentive, and whatever he may have felt, he has managed by an imperturbable manner to conceal his feelings from any offensive display, even in cases where some other judges would perhaps have been less reticent.

Fifty years have passed since the learned judge was called to the Bar and first began the practice of the law in partnership with the Hon. Jas. Patton, the firm being known as Patton & Osler; later he was joined by the late Hon. Thomas Moss, when the firm became Patton, Osler & Moss, a firm which through various fluctuations of membership may be said to have continued to this day. On Mr. Patton's withdrawal the firm continued as Osler & Moss, and afterwards on the accession to its ranks of the late Hon. R. A. Harrison it became known as Harrison, Osler & Moss, all three of its members being ultimately promoted to the Bench. In those days when Mr. Osler was in practice law and equity were distinct branches, and Mr. Osler confined his attention, we believe, exclusively to the common law side of the business—the equity branch being taken by Mr. Moss, the future Chief Justice of Ontario, and one of the most brilliant of Canadian lawyers, whose early death in the zenith of his powers was a national calamity. Mr. Osler was not often seen in the Assize Courts, his reputation as a profound and skilful lawyer was won

in the retirement of his chambers or before the court in Term, rather than in the more public forums of the nisi prius courts; and where, after 19 years at the Bar, he was promoted to the Bench of the former Court of Common Pleas, the appointment was received with general satisfaction by the profession and was amply justified by his judicial career from that day to this. But from his temperament and general disposition the Court of Appeal was a more appropriate tribunal for the display of his judicial abilities, and to this court he was, with the hearty approval of the profession, elevated in 1883, and there he has remained until his retirement, notwithstanding the offer of promotion to the Supreme Court Bench, which he declined in 1888.

Mr. Justice Osler may be said to be a judge of the old school who has combined dignity with learning and simplicity of manners. It has been enough for him to do his duty without ostentation, and he leaves behind him the record of a painstaking, fair-minded, learned and able judge, of whom the province has every reason to be proud.

**REVIEW OF CURRENT ENGLISH CASES.**

(Registered in accordance with the Copyright Act.)

**VESTING ORDER—INFANT—STOCK IN NAME OF INFANT AND ANOTHER TO WHICH INFANT IS ENTITLED—TRUSTEE ACT, 1893 (56-57 VICT. c. 53), s. 35—(R.S.O. 336, s. 15).**

*In re De Haynin* (1910) 1 Ch. 223. In this case, stock to which an infant was beneficially entitled, was standing in the joint names of himself and another person, who was subsequently appointed his guardian, but had been superseded. Another guardian had been appointed for the infant, and an application was now made on the part of the infant and such guardian under the Trustee Act, 1893, s. 35, (R.S.O. c. 336, s. 15), for an order vesting the right to transfer the stock into the name of the present guardian, she undertaking to pay the money into court. Joyce, J., owing to some variation in the wording of the Act of 1893, and the Trustee Act of 1852, thought there was no power to make the order; but the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.J.J.) considered that the case came within the Act of 1893, and made the order on the above undertaking as to bringing the money into court.

**FUND IN COURT—TRUSTEE BENEFICIARY—EQUITIES AS BETWEEN TRUSTEE, BENEFICIARY AND OTHER BENEFICIARIES—DISTRIBUTION OF FUND IN COURT—ADJUSTMENT OF RIGHTS OF BENEFICIARIES INTER SE.**

*In re Rhodesia Goldfields, Partridge v. Rhodesia Goldfields* (1910) 1 Ch. 239. This was a debenture-holder's action, and short point decided therein by Eady, J., is that when there is a trust fund in court, a trustee beneficiary against whom proceedings are pending to recover moneys alleged to belong to the trust fund, is not entitled to receive any share of the fund in court until the amount (if any) due from him to the trust fund shall have been ascertained and made good.

**TRADE MARK—PASSING OFF GOODS AS THOSE OF PLAINTIFF—PARTIES—INJUNCTION.**

*Warwick Tyre Co. v. New Motor & G.R. Co.* (1910) 1 Ch. 248. This was an action to restrain the defendants from using the name of "Warwick," as applied to tires for motor cars, the

facts being that from 1896 to 1905 the plaintiffs had manufactured tires for cycles and motor cycles under the name of "Warwick," so that by the year 1905 the name had become distinctive of the plaintiffs' tires. In 1905 they transferred their business, with the exclusive right to manufacture and sell "Warwick" tires to the Dunlop Company; but they did not assign their goodwill in their trade name of "Warwick." The plaintiffs never manufactured or sold tires for motor cars, nor did the Dunlop Company sell motor tires under the name of "Warwick." The defendants, on the other hand, only manufactured and sold motor tires, and in 1908 the name of their managing director being Warwick, they commenced to sell tires made by them as "Warwick motor tires," and the present action was brought to restrain them from so doing on the ground that they were passing off their goods as those of the plaintiffs. The Dunlop Company was not a party to the action. Two points were made by the defendants, first, that motor tires were distinct from cycle tires, and that as the plaintiffs did not make motor tires there was no ground for assuming that the defendants' goods were those of the plaintiffs, and, secondly, that in the absence of the Dunlop Company the plaintiffs were not entitled to relief. Neville, J., decided both points against the defendants, considering that the name "Warwick" had become a distinctive title of the plaintiffs' tires, and could not be applied by defendants to motor tires made by them, although the plaintiffs did not make motor tires; and as the plaintiffs still retained their goodwill in the name it was unnecessary to make the Dunlop Company parties.

#### TRADE MARK—INNOCENT INFRINGER OF TRADE MARK—DAMAGES.

*Slazenger v. Spalding* (1910) 1 Ch. 257. This was an action to restrain an infringement of the plaintiffs' trade mark as applied to golf balls of their make. The defendants were innocent infringers of this trade mark, and on being notified of the plaintiffs' rights, they at once undertook to remove the mark from balls sold by them, and also from their catalogues. The plaintiffs insisted that they were entitled to an account of sales of golf balls bearing the objectionable mark. The defendants declined to render an account and offered £10 as damages. This the plaintiffs refused to accept and brought the case to trial before Neville, J., who held on the authority of *Edelstein v. Edelstein*, 1 D.J. & S. 185, that the plaintiffs were not, in the circumstances, entitled to substantial damages or to an inquiry,

and that the subsequent passing of the Trade Marks Act had made no difference. He, therefore, gave the plaintiffs costs only up to the date of the defendants' offer.

**LANDLORD AND TENANT—BREWER'S LEASE—TIED HOUSE—COVENANT TO BUY LIQUORS FROM LESSOR—BREACH OF COVENANT—FAIR AND REASONABLE PRICES—CURRENT MARKET PRICES—INJUNCTION.**

In *Conrage v. Carpenter* (1910) 1 Ch. 262 the plaintiffs sought to restrain a breach of covenant by their lessee, the defendant, in the following circumstances: The plaintiffs were brewers, and had leased to the defendant a public-house, the defendant covenanting to buy, and the plaintiff covenanting to sell all malt liquors required for sale in the house at fair and reasonable prices. Owing to the excise on malt liquors being increased, the plaintiffs, in common with other brewers, raised their prices, which was agreed to by the trade generally, but some of the smaller brewers did not raise their prices; the defendant refused to pay the increased price, and purchased liquors elsewhere. Neville, J., who tried the action, held that the increased price was fair and reasonable, and that consequently the plaintiffs were entitled to an injunction, and it was immaterial that by raising prices the plaintiffs and other brewers were shifting the burden of taxation from their own shoulders to those of others.

**WILL—CONSTRUCTION—GIFT OVER TO “NEXT OF KIN WHEREVER THEY MAY BE.”**

In *re Winn, Brook v. Whitton* (1910) 1 Ch. 278. This was a summary application for the construction of the will of a testator who died in 1855; by his will he directed six sums of £15,000 each to be set apart upon trust to pay the income of each sum to a specified nephew or niece, and after his or her death to his or her husband or wife, in case there was no issue, and half the income, if there were issue, and after trusts in favour of the issue, if any, and in the event of the death of any nephew or niece without issue, or having issue, and such issue dying before becoming entitled to the whole of the £15,000, the trustees were to stand possessed thereof, subject to the aforesaid provisions in favour of his said nephews or nieces, their husbands and wives respectively, “upon trust for any next of kin, whoever they may be, living at the time of the trusts failing, as

aforesaid, except the children or other descendants of my nephew, Thomas Winn, deceased." The testator gave his ultimate residue to the same six nephews and nieces, who were respectively tenants for life of the said sums of £15,000. At the testator's death in 1855 these six nephews and nieces were his sole next of kin, and would have been his sole next of kin if he had died at the date of his will. Frederick Shaw was the survivor of the six, and died in 1902 without leaving issue, but leaving a widow who died in 1909. In these circumstances Parker, J., held that, although the class of next of kin was to be ascertained at the time of the testator's death, yet only those took who survived the time when the previous trusts failed, and that on the death of the widow of Frederick Shaw, all the testator's next of kin, at the time of his death, having died, Shaw's £15,000 fell into the residue.

**LANDLORD AND TENANT—RE-ENTRY FOR NON-PAYMENT OF RENT—  
RECOVERY OF POSSESSION—HALF YEAR'S RENT IN ARREAR—  
“NO SUFFICIENT DISTRESS”—ASSIGNEE OF LESSOR—RENT ACCRUED PARTLY BEFORE AND PARTLY AFTER ASSIGNMENT—RIGHT OF ASSIGNEE TO MAINTAIN ACTION—COUNTY COURTS ACT, 1888 (51-52 VICT. c. 43), s. 139—(R.S.O. c. 170, ss. 120, 121)—  
EQUITABLE LEASE.**

*Rickett v. Green* (1910) 1 K.B. 253. This was a summary proceeding by the assignee of a lessor to recover possession of the demised premises, on the ground that the lease contained a proviso for re-entry on non-payment of rent; there being a half year's rent in arrear, and no sufficient distress on the premises. Part of the rent in arrear had accrued due before, and part after the assignment. The proceedings were brought under the County Courts Act, 1881 (51-52 Vict. c. 43), s. 139, which is similar to R.S.O. c. 170, ss. 120, 121. Two points were raised, (1) that no distress had actually been made, (2) that the plaintiff as assignee could not succeed because the whole of the half-year's rent in arrear had not accrued after the assignment. The plaintiff was assignee both of the reversion and also of the benefit of the lessee's covenant. The County Court judge who tried the case gave judgment for the plaintiff, and the Divisional Court (Darling and Phillimore, JJ.) affirm his decision on the ground that the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 10, entitled an assignee to enforce the lessee's covenants both as to rent accrued before and after the assignment. In the absence of such enactment, however, it would

seem that the decision would have been the other way—see *Wit-trock v. Hallinan*, 13 U.C.R. 135, where it was held that the assignee of a reversion could not recover rent accrued due before the assignment, sed vide *Hope v. White*, 17 C.P. 52. There was another little point in the case deserving of notice, namely, the lease in question was void as a legal lease, because it was for more than three years, and not under seal, but the court held that it was a good equitable lease, and as equitable lessor the plaintiff was entitled to the benefit of the statute, as if he had been a legal lessor.

**LANDLORD AND TENANT—FORFEITURE OF LEASE—BREACH OF COVENANT—EJECTMENT—ELECTION TO DETERMINE LEASE—APPLICATION BY UNDER LESSEE FOR RELIEF AGAINST FORFEITURE OF HEAD LEASE—EFFECT OF ORDER RELIEVING AGAINST FORFEITURE—CONVEYANCING AND PROPERTY ACT, 1881 (44-45 VICT. c. 41), s. 14—(R.S.O. c. 170, s. 13).**

*Dendy v. Evans* (1910) 1 K.B. 263. In this case the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.J.J.), have affirmed the judgment of Darling, J. (1909) 2 K.B. 894 (noted, ante, p. 48), and for the same reasons.

**MERCANTILE AGENT—GOODS “ON SALE OR RETURN”—AUTHORITY TO PLEDGE—FACTORS ACT, 1889 (52-53 VICT. c. 45), ss. 1, 2—(R.S.O. c. 150, s. 2(3)).**

*Weiner v. Harris* (1910) 1 K.B. 285. In this case the plaintiff, a wholesale jeweller, entrusted one Fisher, a retailer, with the possession of jewellery on the terms that it was to be sold by Fisher, who was to be entitled to one-half the profits, but if not sold it was to be returned to the plaintiff. Fisher, without authority, pledged the goods with the defendant, a pawnbroker, and the action was brought to recover the goods. Pickard, J., who tried the action, held that Fisher was not a mercantile agent, and was not within the Factors Act (52-53 Vict. c. 45) (see R.S.O. c. 170), and consequently had no power to pledge the goods, and, therefore, that the plaintiff was entitled to recover; but the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.J.J.), took the opposite view, and held the Act applied, and dismissed the action, holding that though the words “sale or return” were used in the letter under which the goods were forwarded to Fisher, yet it was not really a transaction of that kind, because a sale to Fisher was not contemplated, but a

sale by him, and *Hastings v. Pearson* (1893) 1 Q.B. 62 was overruled.

**ARBITRATION—UMPIRE—WITNESS CALLED BY UMPIRE—MISCONDUCT OF UMPIRE—EVIDENCE—REMOVAL OF UMPIRE—ARBITRATION ACT, 1889 (52-53 VICT. c. 49), s. 11—(9 EDW. VII. c. 35, s. 13 (ONT.)).**

*In re Ensch & Zaretzky* (1910) 1 K.B. 327. This case is deserving of attention, because the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.J.J.) has very strongly disapproved of the dicta of the late Lord Esher, M.R., in *Coulson v. Disborough* (1894) 2 Q.B. 316, and *In re Keighley* (1893) 1 Q.B. 405. In the former case he expressed the opinion that a judge might call a witness, and it would be discretionary whether a witness so called could be cross-examined by either party. In the second case he intimated that an arbitrator is not bound by the strict rules of evidence. In the present case upon a reference under an arbitration the umpire had undertaken, on his own responsibility, and without the consent of parties, to call a witness who gave evidence as to matters which one of the parties wished to rebut by evidence of witnesses in Rangoon, and asked an adjournment of the reference for that purpose, which was refused. The Court of Appeal held this to be improper conduct on the part of the umpire, and they disapproved of the dicta of Lord Esher, in the above cases, and on the contrary were of the opinion that arbitrators are bound by the ordinary rules of evidence, and that neither an arbitrator nor a judge has any power to call a witness on his own motion without the consent of parties. In this case the umpire had also refused to state a case unless paid £150, and this also was held to be misconduct, and he was ordered to be removed, and the judgment of the Divisional Court (Darling and Lawrence, J.J.), was reversed.

**CRIMINAL LAW—CONSPIRACY—AGREEMENT TO INDEMNIFY BAIL—ABSENCE OF WRONG INTENT—ACT CONTRARY TO PUBLIC POLICY.**

*The King v. Porter* (1910) 1 K.B. 369. This was a prosecution for conspiracy to commit an unlawful act. The act being the indemnification of bail given in a criminal case. The facts being that one Clark was charged with felony, and Porter and one Brindley together became bail for the appearance of Clark to stand his trial, and Porter and Brindley then entered into an agreement with Clark, that Clark should indemnify them against

liability as such bail. Jelf, J., who tried the case, told the jury that a contract to indemnify bail was contrary to public policy, and illegal, and that if the parties had entered into an agreement of that kind they were guilty of a criminal conspiracy, even though the jury should find there was an absence of any intent to do an illegal act. The jury found the prisoners guilty, and Porter appealed to the Court of Appeal (Lord Alverstone, C.J., and Darling and Phillimore, JJ.), and by that court the conviction was affirmed. The opinion of Martin, B., in *Reg. v. Broome*, 18 L.T. (O.S.) 19, and which was acted on in *Rex v. Stockwell*, 66 J.P. 376, to the effect that bail might contract for an indemnity, was held to be bad law.

#### SUNDAY OBSERVANCE—SUNDAY TRADING—LESSEE OF CROWN.

In *Kelly v. Hart* (1910) A.C. 192 the defendant was prosecuted for breach of a Sunday Observance Act which forbade trading on that day. The defendant was a lessee of the Crown of the refreshment room at a station of a railway operated by the Crown. The lease empowered him to sell cigarettes to actual or intending passengers, and there was no restriction against sales on Sunday. The defendant contended that the Crown was not bound by the Act in question and that he as lessee of the Crown stood in its place to the extent of his rights as lessee, and was therefore not liable. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Collins and Shaw and Sir A. Wilson), however, held that the onus lay on the defendant to shew that the purchasers were actual or intending passengers, and not having discharged that onus he should have been convicted; their Lordships refrain from expressing any opinion as to whether or not the Crown is bound by the Act.

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REPORTS AND NOTES OF CASES.

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Province of Ontario.

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## COURT OF APPEAL.

Ont.] [February 22.

TOWN OF BERLIN v. BERLIN & WATERLOO STREET RY. CO.

*Street railway—Franchise—Assumption by municipality—Valuation—Operation in two municipalities—Compulsory taking*  
—R.S.O. (1897), c. 208, s. 41.

By s. 41 of R.S.O. (1897), c. 208, a municipal corporation which has given a franchise to a street railway company, may, at the expiration thereof, on giving six months' previous notice, assume the ownership of the railway, and all its real and personal property on payment of the value thereof to be determined by arbitration.

The town of Berlin assumed the ownership of the Berlin & Waterloo Street Railway Co., and the latter appealed from the award of arbitrators fixing the value of their railway.

*Held*, reversing the judgment of the Court of Appeal (19 Ont. L.R. 57), that the proper mode of determining the value of the "railway and all real and personal property in connection therewith," was not by capitalizing its net permanent revenue, but by estimating its value as a railway in use and capable of being operated, excluding compensation for loss of its franchise.

*Held*, also, that the company was not entitled to compensation for loss of its privilege of operating the railway in the municipality of Waterloo.

On the expiration of the franchise the company executed an agreement extending for two months, the time for assumption by the municipality, but did not relinquish possession until six months more had expired. Shortly before it was taken over by the municipality an Act of the legislature was passed reciting all the circumstances, ratifying and confirming the agreement for extension of time, and authorizing the municipality to take possession on payment of the award subject to any variation in the amount by the courts.

*Held*, that though this Act did not expressly provide for taking possession on the same footing as if it had been done immedi-

ately on the expiration of the franchise its effect was not to confer upon the town of Berlin a new right of expropriation in respect of an extended franchise, but merely to extend the time for assumption of ownership under the original conditions.

*Quære.* Did the Act just mentioned, by its terms, preclude the company from claiming compensation for loss of franchise?

The rights of the company to compensation are defined by statute, and there is no provision for an allowance of ten per cent. above the actual value of the property.

Appeal allowed with costs.

*Shepley, K.C., and Drayton, for appellants. Bicknell, K.C., and McPherson, K.C., for respondents.*

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Ont.]

[February 25.

*JOHN GOODISON THRESHER Co. v. McNAB.*

*Appeal—Special leave—Time limit—Extension—R.S.O. (1906) c. 139, s. 48(e).*

After the expiration of sixty days from the signing or entry or pronouncing of a judgment of the Court of Appeal for Ontario, the Supreme Court of Canada is without jurisdiction to grant special leave to appeal therefrom, and an order of the Court of Appeal extending the sixty days, will not enable it to do so.

Motion refused with costs.

*J. E. Jones, for motion. Douglas, K.C., contra.*

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Divisional Court.]      *REX v. TEASDALE.*

[March 3.

*Liquor License Act—Conviction for second offence—Amendment of s. 72 after first conviction—Change in penalty for first offence—Interpretation of statutes—Refusal of judge to discharge defendant—Right of appeal to Divisional Court—Rule 777—Proof of previous conviction—Procedure at trial before police magistrate—Failure to comply with R.S.O. 1897, c. 245, s. 101.*

Appeal by the defendant from the order of CLUTE, J., ante 110, dismissing an application by the defendant, on the return of a habeas corpus and certiorari in aid, for his discharge from custody under a warrant of commitment pursuant to a conviction for a second offence against the Liquor License Act.

The appeal was heard by BRITTON, LATCHFORD, and SUTHERLAND, JJ.

BRITTON, J.:—The main objection relied upon before my brother CLUTE was that no conviction for a second offence could be made because of the amendment of s. 72 of the Liquor License Act after the alleged first conviction and before the second conviction. Upon that objection judgment was reserved, and all other objections were upon the argument disallowed. I do not know what the specific objections raised, and so disposed of on the argument, were, but as to the one reserved and afterwards decided as reported, I may say that I wholly agree with the learned judge.

The Crown took as a preliminary objection that there is no appeal: (1) No appeal under the Habeas Corpus Act, as here, to a Divisional Court; although the writ of habeas corpus could have been made returnable before a Divisional Court or before a single judge, in either case the appeal is only to the Court of Appeal; (2) no appeal because of the provisions in the Liquor License Act in regard to appeals, c. 245, ss. 118, 121, R.S.O.

Neither Act in terms prevents such an appeal as is now taken, from a judge in the ordinary course to a Divisional Court. Unless there is a prohibition in terms or by necessary implication, there is no reasons why the case is not covered by rule 777. The judgment pronounced by Mr. Justice CLUTE, if it stands, finally disposed of the matter.

Under the Liquor License Act (s. 121) the appeal will lie to the Court of Appeal from a judgment of the High Court or a judge thereof, "but no such appeal" (i.e., appeal to the Court of Appeal) "shall lie from the judgment of a single judge or from the judgment of the court if the court is unanimous, unless in either case the Attorney-General for Ontario certifies," etc. That seems to imply that a party may as of right and in the ordinary case go from a single judge to a Divisional Court: *Rex v. Lowery*, 15 O.L.R. 182.

I am of opinion that the Divisional Court has jurisdiction, and so the objections must be considered.

Assume that the offence charged as of the 3rd November, 1909, was approved, and that the prisoner was found guilty, then, and not before, the prisoner should have been asked "whether he was previously convicted, as alleged in the information."

The allegation in the information is that the prisoner was on the 28th July, 1908, at the town of Cobourg, before the police magistrate in and for the town of Cobourg, duly convicted of

having on the 11th June, 1908, at the village of Colborne, in the county of Northumberland, unlawfully sold liquor without the license therefor by law required. The prisoner, after having been made aware of that allegation, should have been asked, in substance, at least, with some regard to the requirement of the statute, whether he was previously convicted as so alleged, or not. If, upon this inquiry being made, the prisoner had answered that he was so previously convicted, he could have been sentenced. Had the prisoner denied or had he not answered directly, proof of the previous conviction would have been required.

The record does not shew that the statutory procedure was complied with.

The police magistrate says, in his minute of conviction, that subsequently, and on the same 11th December, 1909, the defendant pleaded guilty upon a charge of having been previously convicted at the 28th July, 1908, of having on the 11th June, 1908, at the village of Colborne, in the county of Northumberland, sold liquor without the license therefor by law required. The place of conviction is not stated, nor is the name of the convicting magistrate, although both are in the information. Then the police magistrate, no doubt acting in perfect faith, and intending to comply with the law, puts the previous conviction in the form of a charge against the prisoner. He is charged with having been previously convicted, and to this charge it is alleged that the prisoner pleaded guilty. It could not be put in the form of a charge. It is not an offence to have been convicted of an offence . . . Putting the matter in this form is conclusive evidence to me that the police magistrate did not, in fact, comply with the statute, and it may be a matter of regret that the prisoner, if, in fact, guilty of the previous offence, and subsequent offence of selling liquor without license should escape without the full punishment to which he was sentenced; yet that cannot be avoided. It is important that, before imprisonment, guilt should be established, and that the conviction should be in due form of law. I do not give effect to any of the many objections taken by prisoner's counsel.

My decision is that s. 101 of c. 245, was not, in form or substance, complied with . . .

Reference to *Rex v. Brisbois*, 15 O.L.R. 264; *Regina v. Fee*, 13 O.R. 590.

Order will go for discharge of prisoner. No costs.

LATCHFORD, J., concurred, stating his reasons briefly in writing.

**SUTHERLAND, J.**, also concurred.

*J. B. Mackenzie*, for the defendant. *E. Bayly*, K.C., for the Crown.

Ont.] WHYTE PACKING CO. V. PRINGLE. [March 4.

*Appeal—Special leave—Public interest—Important questions of law—Exemption from taxation—School rates—R.S. (1906) c. 139, s. 48.*

By a municipal by-law an industrial company was given exemption from taxation for a term of years. P., a ratepayer of the municipality, applied for a writ of mandamus to compel the council to assess the company for school rates, which, he claimed, were not included in the exemption. The decision to grant the writ was affirmed by the Court of Appeal, 20 Ont. L.R. 246. On motion for special leave to appeal from the latter judgment,

Held, that the case was not one of public interest, and did not raise important questions of law. It did not, therefore, fall within the principles laid down in *Lake Erie & Detroit River Railway Co. v. Marsh*, 35 Can. S.C.R. 197, for granting such leave.

**Motion refused with costs.**

*Chrysler, K.C., for motion. J. Travers Lewis, K.C., contra.*

Falconbridge, C.J.K.B.] [March 7.

**REX V. BECKETT ET AL.**

**Criminal law—Conspiracy—Trade combination—Criminal Code, s. 498—Restraint of trade—Prevention of competition—Evidence—Findings of fact.**

A prosecution for an alleged conspiracy connected with trade and commerce, laid under s. 498 of the Criminal Code.

The indictment was found by a grand jury at Hamilton; the defendants exercised the option given by s. 581 of the Code, and elected to be tried before the Chief Justice without a jury, and by consent the venue was changed to Toronto.

The indictment charged that Henry C. Beckett, George E. Bristol, John I. Davidson, Thomas B. Escott, W. G. Craig, Joseph E. Eby, Thomas Kinnear, the Dominion Wholesale Grocers' Guild, and the Ontario Wholesale Grocers' Guild, did, in and during the years 1898, 1899, 1900, 1901, 1902, 1903, 1904, and 1905, at the city of Hamilton, and elsewhere in the Province of Ontario, unlawfully conspire and agree and arrange one with

the other and others of them, and with some 208 named persons, firms, and corporations, and with the several members, officers, etc., and other persons, firms, and corporations at present unknown: (1) Unduly to limit the facilities in producing, manufacturing, supplying and dealing in sugar, tobacco, starch, canned goods, salt and cereals, and other articles and commodities, being articles and commodities which are the subject of trade and commerce; (2) and to restrain and injure trade and commerce in relation to such articles and commodities; (3) and unduly to prevent, limit and lessen the manufacture and production of such articles and commodities; (4) and unreasonably to enhance the price of such articles and commodities; (5) and unduly to prevent and lessen competition in the production, manufacture, purchase, barter, sale, and supply of such articles and commodities; against the form of the statute, etc.

FALCONBRIDGE, C.J.:—Counsel for the Crown admitted that no case had been made against the defendants under clause (1) of the indictment, corresponding to sub-s. (a) of s. 498 of the Code . . . and that the case would have to be maintained, if at all, under the remaining charges corresponding to sub-ss.(b), (c) and (d) of s. 498.

(The Chief Justice referred to portions of the evidence; and then cited and quoted from the following authorities: Jolly on Contracts in Restraint of Trade; *Nordenfeldt v. Nordenfeldt-Maxim* (1894) A.C. 535, 553, 556; *Ontario Salt Co. v. Merchants Salt Co.*, 13 Gr. 540, 542, 543; *Rex v. Elliott*, 9 O.L.R. 648; *Rex v. Master Plumbers' Association*, 14 O.L.R. 295, 300, 302, 309; *Mogul SS. Co. v. McGregor* (1892) A.C. 36; *Allen v. Flood* (1898) A.C. 138; *Wampole & Co. v. F. E. Karn Co.*, 11 O.L.R. 619; *Quinn v. Leathem* (1901) A.C. 506; *The King v. Clark*, 14 Can. Crim. Cas. 46, 57; *The King v. Gage*, 13 Can. Crim. Cas. 415; *Gibbons v. Metcalfe*, 15 Man. L.R. 583; Eddy on Combinations, vol. 1, s. 556; *Bohm Manufacturing Co. v. Hollis*, 54 Minn. 223, 55 N.W.R. 1119, 1120; *Commonwealth v. Grimstead*, 108 Ky. 59, 111 Ky. 203; *Gibbs v. Consolidated Gas Co.*, 130 U.S. 396, 409; *People's Gas Light Co. v. Chicago Gas Light Co.*, 20 Ill. App. 492.)

I find the facts then to be as follows:—

1. The defendants have not, nor has any of them, intended to violate the law.

2. Nor have they, nor has any of them, intended maliciously to injure any persons, firms, or corporations, nor to compass any restraint of trade unconnected with their own business relations.

3. They have been actuated by a bona fide desire to protect their own interests, and that of the wholesale grocery trade in general.

As far as intentions and good faith or the want of it are elements in the offence with which they are charged, the evidence is entirely in their favour.

Have they been guilty of a technical breach of law? This question is answered by the citations, which I have given above, and which cover every branch of the case.

I, therefore, say that the defendants are not, nor is any of them, guilty as charged.

These are minor matters as to which I, sitting as a jury, give the defendants (as I am bound to do) the benefit of the doubt, and as to which I warn the defendants, and those in like case to be careful, e.g., as to alleged efforts to coerce wholesale dealers into joining the guild.

It is of the essence of the innocence of the defendants that the privileges which they seek to enjoy should be extended to all persons and corporations who are strictly wholesalers, whether they choose to join the guild or not.

*G. T. Blackstock, K.C., and S. F. Washington, K.C., for the Crown. E. F. B. Johnston, K.C., E. H. Ambrose, and Eric N. Armour, for the defendants.*

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Divisional Court.]

[March 7.

BARNETT v. GRAND TRUNK R.W. Co.

*Railway—Collision—Negligence—Injury to licensee or trespasser on train run into by car of another railway—Liability for gross negligence—Highway—Findings of jury—Reversal of judgment of trial judge—Judgment for plaintiff instead of new trial.*

An appeal by the plaintiff from the judgment of MEREDITH, C.J.C.P., upon the findings of a jury, in favour of the defendants, in an action for damages for injuries sustained by the plaintiff by reason of a collision between a train of the Pere Marquette Railway Company upon which the plaintiff was riding, and a van or car of the defendants in the railway yard at London, the collision being caused by the negligence of the defendants, as the plaintiff alleged.

The appeal was heard by BOYD, C., MAGEE, and LATCHFORD, JJ.

The judgment of the court was delivered by BOYD, C.:—

Though the conductor was on the train of empty cars which were being backed to the junction, he was not in charge of the movement; it was in the hands of Cole, who gave the signal to switch—for the information of the Grand Trunk officials—and was at the moving end of the coach with lantern on the look-out. Before the backing began, the plaintiff was on the platform, which was then at the front of the backward movement, close beside Cole, to whom he spoke, and also leaned over him to see what delayed the starting after the signal had been given. From the evidence of the plaintiff and the plaintiff's wife, I would infer that what Cole says as to his being on the platform before the backing began and at the time of the collision, actually occurred, and that he was there with the permission of the man in charge of the cars. This may have been in contravention of rules or orders not known to the plaintiff, but with the knowledge of Cole, who, however, made no objection to the plaintiff being where he was. This was the only occasion when the plaintiff had taken this ride on this train, for his own convenience, when in charge of these men, and he did not know Cole—but the uncontradicted evidence is that he had done this on many other occasions without check or comment from the officials—so that he was not a mere trespasser, but under an honest mistake that he was not transgressing this permissive use of the train. I should find on this evidence his legal status to be that of a licensee getting a gratuitous lift on the cars to the stopping place at the junction. The duty of the defendants was to manage their cars so that no negligent injury should be done to the Pere Marquette cars using this "lead," which is said to be their property. It is conceded that this caboose of the defendants was moved violently against the backing cars of the Pere Marquette Railway Company so as to injure the plaintiff. This is characterized by the learned Chief Justice as the "result of gross negligence." If the plaintiff was not wrongfully where he was on the Pere Marquette train, then he is entitled to recover damages against the defendants—by the English authorities.

(Reference to *Harris v. Perry* (1903), 2 K.B. 219; *Wilton v. Middlesex R.R. Co.*, 107 Mass. 108; *Philadelphia and Reading R. Co. v. Day*, 14 How. S.C. 468; *R.R. Co. v. Stout*, 17 Wall S.C. 661; *Sievert v. Brookfield*, 35 S.C.R. 494; *Grand Trunk R.W. Co. v. Richardson*, 91 U.S. 454, 471; *Nightingale v. Union Colliery Co. of British Columbia*, 35 S.C.R. 67.)

Now the law is with the plaintiff clearly if he is a licensee, and I think so also if he is an honest or mistaken trespasser.

Such an one is described by Beven, Can. ed. (1908), vol. 2, pp. 952, 953. I do not read the answers of the jury to the questions submitted as a finding that the plaintiff was a trespasser upon the defendants' train. All they have found is that the plaintiff was not on the train or platform by the permission of the Pere Marquette Railway Company.

It is not without significance that the accident—the collision—happened upon the tracks laid on the public highway on Waterloo Street . . . Given the circumstances of this case, it does not seem to me that the defendants are exempt from liability, though the plaintiff was nothing else than a mere trespasser.

As to the degree of liability incurred by the Pere Marquette Railway Company, had they been the authors of the jury, and imputing a like degree of liability as to the defendants—and for the defendants the situation cannot be put more favourably to them—the authorities mark a distinction of duty between the case of permitting a licensee to be on a place or pass over a place, and that of taking him on a vehicle or otherwise carrying him. That is discussed in *Harris v. Perry*, and it is indicted that a greater degree of care is called for in the latter case. But, after all, it is a question for the jury, and the observations of ESHER, M.R., in *Thatcher v. Great Western R.W. Co.*, 10 Times L.R. 13, are very pertinent. "No doubt," he says, "in strict logic, the railway company had not the same amount of duty to persons permitted to come on their premises as they had to persons who paid money in consideration of being taken as passengers. But, so far as regarded the taking of means for providing for personal safety, it was impossible to measure the difference between their duty to the one class of persons and their duty to the other." And in the same case LOPES, L.J., says (discarding the term "licensee") : "If a person permitted another to come on his premises, and knew him to be there, it was his duty to take reasonable care not to injure him." See *Barnes v. Ward*, 9 C.B. 393, 420.

It appears to me that the plaintiff is entitled to a verdict, and that it is not necessary for us to direct (in view of the consent of counsel to our dealing with the case) that there should be a new trial.

Judgment for the plaintiff with costs.

*J. F. Faulds*, and *P. H. Bartlett*, for the plaintiff. *W. Nesbitt*, K.C., for the defendants.

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Divisional Court.]

[March 9.

ST. GEORGE MANSIONS v. KING.

*Landlord and tenant—Possession after expiry of lease—Treaty for new lease—Tenancy at will.*

Appeal by the defendant from the judgment of DENTON, Jun. J., of the County Court of York, in favour of the plaintiffs in an action in that court to recover rent of an apartment under an alleged lease or agreement for a period after the defendant had vacated the premises on the 30th April, 1909, having given one month's previous notice in writing of his intention to quit. The court (FALCONBRIDGE, C.J.K.B., BRITTON and SUTHERLAND) held that the defendant being permitted to continue in possession pending negotiations for a new lease, was not a tenant for a year, nor from year to year, but only a tenant at will: *Idington v. Douglas*, 6 O.L.R. 266. Appeal allowed with costs, and action dismissed with costs.

*J. M. Ferguson*, for the defendant. *J. A. Macintosh*, for the plaintiffs.

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Divisional Court.]

[March 9.

HOSKIN v. MICHIGAN CENTRAL R.R. Co.

*Railway—Injury to passenger alighting—Defective step—Negligence—Jury.*

An appeal by the defendants from the judgment of MAGEE, J., in favour of the plaintiff, upon the findings of a jury, for the recovery of \$1,250 damages for personal injuries sustained by the plaintiff in alighting from a car of a train of the defendants at Amherstburg. The plaintiff alleged that the injuries were attributable to the defendants' negligence in permitting the car to be equipped with a defective and improper step. The court (FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, J.J.) held (RIDDELL, J., dissenting), that they could not interfere with the verdict. The plaintiff was not bound to adduce specific evidence that the use of such a step constituted negligence. The jury had a right to infer that the use of a rickety, insecure, or unsuitable box for the purpose of assisting passengers to alight, constituted negligence. RIDDELL, J., was of opinion that the jury had not found sufficient facts upon which to base a finding of negligence on the part of the defendants, even if such a finding could in any sense be based upon the fact that the portable step was not of the same length as the car step. He was in favour of directing

a new trial. The judgment of the court was that the appeal should be dismissed with costs.

*D. W. Saunders, K.C., for the defendants. J. H. Rodd, for the plaintiff.*

Master in Chambers.]      *HARRIS v. WISHART.*      [March 10.

*Foreign commission—Postponement of trial.*

Motion by the defendant for a commission to take evidence in England and to postpone the trial until the return.

*Held*, that, while it may be a great inconvenience to the plaintiff to have the trial delayed, the first consideration is a fair trial to all concerned: *Ferguson v. Millican*, 11 O.L.R. 35; and the evidence sought is material. Order made for a commission.

*W. J. Boland, for the defendant. J. E. Day, for the plaintiff.*

Divisional Court.]      [March 10.

*STAUNTON v. KERR.*

*Solicitor—Costs—Company—Contract—Retainer—Evidence—Conflict—Credibility of witnesses—Corroboration—Finding of trial judge—Appeal.*

Appeal by the plaintiff from the judgment of BOYD, C., dismissing the action, which was brought by a solicitor against an incorporated company and another solicitor upon a bill of costs.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

RIDDELL, J.:—The plaintiff had, as he supposed, a claim for costs against the E. Van Allen Co., Limited; negotiations were going on for the sale of the capital stock of this company to the defendant Kerr's client; and the plaintiff and the defendant Kerr met. The plaintiff was himself the owner of some of the capital stock, and, according to his contention, the defendant Kerr "definitely agreed . . . at that time that, if I would carry out this sale, so far as myself and my friends were concerned, he would pay me the \$500 and the disbursements." The stock was transferred.

If this agreement was made in the terms set out, there can be no doubt that the defendant Kerr should pay the amounts agreed upon—the Statute of Frauds has no application to a contract of that kind. But Kerr denies that such an agreement was made; and the trial judge is unable to find that the plain-

tiff's versions is correct. It is true that there is some corroboration of the plaintiff's story, but there is nothing in our law to oblige a trial judge (any more than a jury) to accept the evidence of two witnesses rather than one. The principle referred to by TASCHEREAU, J., . . . in *Lefeunteum v. Beaudoin*, 28 S.C.R. 89, at p. 93, has no application to this case, even supposing it to be applicable to our law in any case. The learned judge says: "It is a rule of presumption that ordinarily a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative, *magis creditur duobus testibus affirmantibus quam mille negantibus*, because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed." I do not accept in our law either the reasons for the supposed rule or the rule itself. But, assuming its application to any case, it has none here—each witness gives his version of what took place at the meeting—Kerr's evidence is as affirmative as Staunton's, and Staunton's is as much a negative of Kerr's as the converse.

In view of the decisions, which it cannot be necessary again to cite, I think it impossible to say that the plaintiff has made out a case against the defendant Kerr.

As regards the company, I do not think it necessary to go into the law affecting a director who acts as a solicitor for a company. After an attentive perusal of the evidence, I am unable to find that Staunton was either in fact or in form retained by the company. It may seem clear enough that Van Allen retained him, but the retainer (if any) was for Van Allen himself, and not for the company.

I am of opinion that the appeal should be dismissed with costs. . . .

BRITTON, J.:—I agree that the appeal should be dismissed.

FALCONBRIDGE, C.J.:—I agree with my learned brothers in their disposition of the appeal as to the defendant company.

But I have the misfortune to hold a different view as to the case against the individual defendant.

The finding of the learned Chancellor involves no expression of personal opinion, but is based on a purely academic and scientific rule; and it is not, therefore, in my humble judgment, entitled to the high deference which is accorded to the specific finding of fact of a trial judge on conflicting evidence, as illustrated in *Bishop v. Bishop*, 10 O.W.R. 177; *Lodge Holes Colliery Co. v. Mayor, etc., of Wednesbury* (1908) A.C. 323, at p. 326.

Without suggesting any impairment of this now well-established rule, and without dissenting from the Chancellor's theory that the parties here are entitled to equal credit, I would have decided that the plaintiff's statement was better corroborated than that of the defendant, and that it was true in fact; and so I am of opinion that the judgment on this branch of the case ought to be set aside, and a verdict entered for the plaintiff against the defendant Kerr. . . .

*W. N. Douglas, K.C., for the plaintiff. R. McKay, for the defendant company. G. M. Clark, for the defendant Kerr.*

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Master in Chambers.]

[March 15.

BROWN v. CITY OF TORONTO.

*Jury notice—Action against municipal corporation—Misfeasance or non-feasance.*

Motion by the defendants to set aside the plaintiff's jury notice in an action against the city corporation to recover damages for injuries caused to the plaintiff "by reason of a hole or depression in the boulevard," at the north-west corner of Elizabeth and Albert streets, "caused by the negligence of the defendants taking up the old sidewalk and not filling in."

Held, a case of non-repair within s. 104 of the Judicature Act. Reference to *Burns v. City of Toronto*, 13 O.L.R. 109; *Keech v. Town of Smith's Falls*, 15 O.L.R. 300, 302; *Sangster v. Town of Goderich*, 13 O.W.R., at p. 421; *Dickson v. Township of Haldimand*, 2 O.W.R. 969, 3 O.W.R. 52; *Smith v. City of Vancouver*, 5 B.C.R. 491; *Goldsmith v. City of London*, 16 S.C.R. 231; *Barber v. Toronto R.W. Co.*, 17 P.R. 293. Order made striking out the jury's notice; costs in the cause.

*H. Howitt, for the defendants. S. H. Bradford, K.C., for the plaintiff.*

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Meredith, C.J.C.P., in Chambers.]

[March 16.

KEMERER v. WATTERSON.

*Writ of summons—Service out of jurisdiction—Con. Rule 162 (e), (h)—Place of contract—Place where payment to be made—Assets in Ontario—Garnishable debt—Conditional appearance.*

Appeal by the defendant from the order of the Master in Chambers, dismissing a motion by the defendant to set aside the order of a registrar, sitting for the Master in Chambers and the

writ of summons and the service of it upon the defendant in Montreal, but giving him leave to enter a conditional appearance.

MEREDITH, C.J.:—The material upon which the registrar's order, which gave leave to serve the writ out of Ontario, was made, was, no doubt, insufficient, but, upon the material before the Master on the motion, he, upon the authority of *Great Australian Co. v. Martin*, 5 Ch. D. 1, properly dealt with the motion upon the material before him, which would have been sufficient in the first instance to have warranted the making of the order.

The right to have service out of Ontario allowed is rested by the plaintiff upon the provisions of Con. Rule 162, clause (e) and (h).

The Master, following *Canadian Radiator Co. v. Cuthbertson*, 9 O.L.R. 126, being of opinion that, upon the material before him, it was in doubt, "(1) whether payment under the contract was made in Ontario or Quebec, and, if made in Quebec, whether payment was to be made in Ontario, and (2) whether the defendant had assets in Ontario sufficient to satisfy Rule 162, clause (h)—though that seemed not unlikely"—made the order which is complained of.

If, as Mr. McCoomb deposed, there was no binding contract prior to the shipment of the goods at Morrisburg, the case comes, according to *Blackley v. Elite Costume Co.*, 9 O.L.R. 382, within clause (e) of Rule 162, for the contract would then be governed by the law of Ontario, and in that case the place of payment would be in Ontario where the creditor resides.

Mr. McCoomb's statement is disputed by the defendant, and in such cases, as decided by the Chancellor in *Canadian Radiator Co. v. Cuthbertson*, the proper practice is "not to try the disputed question of jurisdiction upon affidavits, but to permit the defendant to enter a conditional appearance and thereafter raise his contention on the record."

It is also, I think, shewn that the defendant, at the time the order was made, had assets in Ontario, within the meaning of clause (h) of Rule 162. That one person or firm at all events owed him a garnishable debt of more than \$200, is not open to question.

It was contended . . . that this debt was not assets in Ontario within the meaning of the rule, but I am unable to agree with that contention. That a garnishable debt is assets within the meaning of a similar rule was the opinion of the Court of King's Bench in Manitoba in *Brand v. Green*, 13 Man. L.R. 101, of Mathers, J., in *Gulliver v. Cantelon*, 16 Man. L.R. 644; and of Macdonald, J., in *Bank of Nova Scotia v. Booth*, 10 W.L.R. 313.

The decisions of the Manitoba courts are in accordance with the statement of the law by Mr. Dicey in his Conflict of Laws (2 ed.), p. 310. . . . *Commissioner of Stamps v. Hope* (1891) A.C. 476, 481, 482. . . . *Winans v. The King* (1898) 1 K.B. 1022, 1030.

If, as was contended . . . , the statement of Mr. Dicey is to be limited in its applications to the determination of the situation of the debt for the purposes of an administration, the reasons which led to its adoption in the case of administration, I think, apply to clause (h) of Rule 162.

The purpose of the rule manifestly is to enable a creditor, who is not otherwise entitled to sue his debtor in an Ontario court, to do so for the purpose of obtaining satisfaction out of the debtor's property in Ontario which may be made available to satisfy a judgment recovered in an Ontario court, and it must, therefore, I think, have been intended that whatever property in Ontario might be made available for that purpose should be assets within the meaning of the rule.

(Reference to *Love v. Bell Piano Co.*, 10 W.L.R. 657, disapproving it.)

Appeal dismissed; costs in the cause.

*E. P. Brown*, for the defendant. *W. R. Smyth*, K.C., for the plaintiff.

Master in Chambers.]

[March 16.

*McDONNELL v. GREY.*

Venue—Action against License Commissioners—R.S.O. 1897, c. 88, s. 1.

Motion by the defendants to change the venue from Barrie to Whitby. The action was against the License Commissioners and Inspector for North Ontario for an injunction restraining the defendants from removing a license from hotel premises owned by the plaintiff, or for mandamus to restore the same, and for damages and other relief. The motion was made on the ground that the defendants were persons fulfilling a public duty, within the meaning of R.S.O. 1897, c. 88, and that this was an action which, under s. 15 should be tried in the county where the act complained of was committed, i.e., in the county of Ontario. The defendants relied on *Leeson v. License Commissioners of Dufferin*, 19 O.R. 67, and the plaintiff on *Haslem v. Schnarr*, 30 O.R. 89. The Master distinguished the *Leeson* case, and following the *Haslem* case, dismissed the motion; costs in the cause.

*H. P. Cooke*, for the defendants. *D. Englis Grant*, for the plaintiff.

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Master in Chambers.]

[March 17.

STANDARD CONSTRUCTION CO. v. WALLBERG.

*Conditional appearance—Defendant residing out of the jurisdiction—Joint liability.*

Motion by the defendant Wallberg for leave to enter a conditional appearance. The action was against Wallberg and a company to recover the value of work done by the plaintiffs. The defendant Wallberg resided in Montreal, and was sued as jointly liable for the work. He wished to dispute the jurisdiction of the court, but did not move to set aside the service upon him or the order for the issue of a concurrent writ. The motion was refused. Con. Rule 162(e) and (h); *Comber v. Leyland* (1898) A.C. 527, and *Emanuel v. Symon* (1908) 1 K.B. 302, referred to. Motion dismissed with costs to the plaintiffs in any event.

*M. Lockhart Gordon*, for the defendant Wallberg. *G. F. McFarland*, for the plaintiffs.

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Divisional Court.]      SMITH v. FINKELSTEIN.      March 17.

*Contract—Work and labour—Non-completion—Payment—Certificate of engineer.*

Appeal by the defendant from the judgment of the District Court of Nipissing in favour of the plaintiffs in an action to recover \$460 for sinking a shaft on the defendant's mining property. The appeal was based on three grounds: (1) That the certificate of the defendant's engineer was a condition precedent to the right of the plaintiffs to recover; (2) that the plaintiffs failed to complete their contract; (3) that the flow of water into the shaft was not a sufficient reason for abandoning the work.

LATCHFORD, J., delivering the judgment of the court (BOYD, C., MAGEE and LATCHFORD, JJ.), said that there was little merit in the appeal. The plaintiffs did their work as directed and were willing to continue to do any further work the defendant or his engineer might ask them to do. They were willing to sink another shaft, if asked, but they were not asked, and no other work was assigned to them. It was unreasonable to expect that the plaintiffs should keep themselves and their men for days, at large expense, upon the property, awaiting instructions. They were justified, in the circumstances, in abandoning the work. Further sinking in the last shaft was impossible. The strong in-flow from a source several feet below the bottom of the shaft rendered the shaft useless as a mining shaft. It could be worked (if at

all) only at very great expense. The engineer's statement in his telegram to the defendant that the water was surface water was untrue. He asked the defendant whether he should withhold payment; and the defendant, misled by his false statement, so directed him. Whether there was or was not such an interference with his discretion as was discussed in *Wallace v. Temiskaming and Northern Ontario Railway Commission*, 12 O.L.R. 126, 37 S.C.R. 696, is immaterial. The report was, in the circumstances, not a condition precedent to the plaintiffs' right to recover. Appeal dismissed with costs.

*J. H. Spence*, for the defendant. *J. P. MacGregor*, for the plaintiffs.

Divisional Court.]

[March 18.

**CAMPBELL v. COMMUNITY GENERAL HOSPITAL ALMSHOUSE AND SEMINARY OF LEARNING OF THE SISTERS OF CHARITY, OTTAWA.**

**Contract—Charitable corporation—Absence of seal and writing—Partly executed contract—Powers of corporation—Work and labour—Recovery for work done—Quantum meruit.**

Appeal by the plaintiffs from the judgment of BRITTON, J., ante 387, dismissing without costs an action brought to recover the value of work done for the defendants in digging a well.

The appeal was heard by BOYD, C., MAGEE and LATCHFORD, JJ.

BOYD, C. (after stating the facts, which may be found in the former note, p. 387) :—That the contract is intra vires does not seem to me to be doubtful. The farm was held by the corporation for the purposes of the well-being of the sisterhood and all the beneficiaries of the charity. It provided supplies of butter, milk and vegetables, which had to be procured from some source and better from this farm managed in their interest than from any other. The farm was largely and substantially ancillary to the proper maintenance of the institution; and it follows that for the proper management of the farm and the stock a plentiful supply of good pure water was indispensable, and in no other way could this be procured than by the digging or sinking of wells. That this well was needed is not disputed—is indeed admitted—the only qualification made by the lady-manager is that it was "not very badly needed."

The modern doctrine as to corporate contracts not under seal, in the case of other than trading corporations, is thus given in

the Laws of England, published under the imprimatur of the Earl of Halsbury: "The rights and liabilities upon such contracts depend upon whether the contracts relate to matters incidental to the purpose for which the corporation exists, and whether the consideration therefor had been executed by the party seeking to enforce them": vol. 8, tit. "Corporations," p. 383, No. 848 (1909).

Referring to the terms of the charter, it appears that the community had established an hospital for the reception and care of indigent and infirm sick persons of both sexes and of orphans of both sexes, and they were incorporated to carry on the good work, with power to hold and enjoy lands and tenements within the province: s. 1 of 12 Vict. ch. 108. And by s. 2 it was provided that the revenues, issues, and profits of all real and personal property should be applied to the maintenance of the members of the corporation, the construction and repair of buildings requisite for purposes of the corporation, and the payment of expenses to be incurred for objects legitimately connected with or depending on the purposes aforesaid.

These last words are, I take it, ample to cover a contract for the making of a well on the farm-land—that being an expense incurred for an object legitimately connected with the maintenance and the needs of the inmates of the institution. The learned judge puts it very succinctly: "The corporation, being owner of a farm on which stock is kept, requires water for the purpose of carrying on the farm, and this work was a necessity for farm purposes; and that water is not found is not the point.

It seems to me that the distinction once insisted on as to the work done being "essential" to the purposes of the corporation is to be modified by the trend of recent decisions so that "beneficial" work is enough if it be incidental or ancillary to the purposes for which the corporation exists. Mathew, J., in his observations on this line of cases in *Scott v. Clifton*, 14 Q.B.D., at p. 903, uses "necessity" as almost synonymous with "benefit"—a seal not being required when the contract is for a purpose incidental to the performance of the duties of the corporate body, and its necessity is shewn by proof that the corporation, with full knowledge of its terms and of all the facts, had acted upon and taken the benefit of its performance.

Complete execution of the contract is not essential where there is actual part performance, and the completion of the work has been prevented by the act of the corporation. The well was sunk to the depth of 150 feet, to be utilized at a later season, and

the plaintiffs were willing and offered to prosecute the work till water had been reached. Of the benefit of this work the corporation has been in possession, and there is no complaint of its improper execution, as far as it has gone.

In *Lawford v. Billericay Rural District Council* (1903) 1 K.B. 772, the argument for the corporation was that the combination of the two facts that the work has been done, and that it is incidental to the purposes of the corporation, is not enough to give a right of action. Besides, there must be at the making of the contract a question of convenience amounting to necessity, etc.: p. 778. In giving judgment, Vaughan Williams, L.J., in commenting on *Nicholson v. Bradfield Union*, which was based on *Clark v. Cuckfield*, says the ground of the decision was that the coals were accepted and used, and that the law raised an implied contract to pay for them, though there was no contract under seal, and he did not understand that the case was decided upon the recognized exception as to necessity: p. 781. And he treats *Clark v. Cuckfield* as decided upon the ground of the recognition of a contract arising on the receipt of the benefit of acts done at the request of the corporate body: p. 782.

And in *Bernardin v. Municipality of North Dufferin*, 19 S.C.R. 595, the majority of the court approve of the sound and rational principle equally applicable to the case of every corporation, that where work has been executed for a corporation under a parol contract, which work was within the purposes for which the corporation was created, and it has been accepted and adopted and enjoyed by the corporation after its completion, it would be fraudulent for the corporation to refuse to pay for it because of the absence of the corporate seal: p. 595.

I do not further labour this point as to the absence of the seal—which does not appear to me to affect the plaintiffs' right of action.

The learned judge has expressed the opinion that, if the plaintiffs are entitled to recover, their damages should be assessed at \$175. But the action is not for breach of contract, but to recover the value of the work done, so far as it went—in effect a quantum meruit—and the usual rule in such case is to take the contract price as the measure to be applied. In that view the plaintiffs should have judgment for \$308 and costs and to that I think they are entitled.

MAGEE and LATCHFORD, JJ., concurred.

A. E. Fripp, K.C., for the plaintiffs. W. E. Middleton, K.C., for the defendants.

Riddell, J.]

[March 19.

## TRADERS FIRE INSURANCE CO. v. APPS.

*Contract—Subscription for company shares—Evidence that subscription obtained by false representation—Corroboration—Refusal to accredit uncontradicted evidence of witnesses.*

The defendant, a widow, admittedly signed a subscription for \$3,000 of the capital stock of the plaintiffs, a fire insurance company, therein covenanting to pay \$300 within 60 days and all calls as made by the directors. She paid the \$300 and received a certificate for 30 shares. Subsequent calls were made, but she did not pay; and this action was to recover these calls.

RIDDELL, J.:—To avoid liability the defendant sets up that while she knew she was subscribing for \$3,000, she was assured that she never would be called upon to pay more than \$300; and that the subscription she signed was read over to her as containing such provision. Her son corroborates her. She also says that one Carroll represented that he himself was going to take stock in the company; but even if this were true, it would not advantage the defendant, being not a representation of an existing or past fact; and, moreover, Carroll was not in any way connected with the company.

If I could accept her statements as being true, the well-known cases of *Foster v. MacKinnon*, L.R. 4 C.P. 704, and *Lewis v. Clay*, 14 Times L.R. 149, would be relied upon as furnishing a complete defence. I shall assume, without deciding, that the principle of these cases applies.

There is no contradiction of the evidence; Camp, the agent, is dead, and it is said that Carroll cannot remember anything about the facts.

When the evidence was being given in the witness box I thought that the defendant and her son were not consciously and intentionally stating what was untrue, but I was not at all satisfied that what they swore to was the truth—rather the reverse. I reserved judgment to see if my mind would be changed by a perusal of the documents and further consideration. I do not think that any good end would be achieved by going into the correspondence and transactions subsequent to the execution by the defendant of the subscription. There is nothing to indicate that the story of the defendant is true.

In *Rex v. Van Norman*, 19 O.L.R. 447, I held that “there is no rule in our law that a judge or jury or other trial tribunal must accredit any witness, even although not contradicted”: p.

449. The Chief Justice of the Common Pleas refused to allow any appeal from this decision, and I follow it.

On the short ground that, it being admitted that the defendant executed the document sued upon, and consequently the onus is upon her to prove that her understanding of the document was different from its actual contents, and that, from what I saw of the witnesses in the box, I cannot find that she has met the onus, the defence fails. I have no doubt that both she and her son have persuaded themselves of the truth of their story, but I cannot accept it as the fact, and I do not think that any misrepresentation of any kind has been proved.

No objection was taken to the right to recover or the amount if the defendant were held bound by the subscription.

The plaintiffs will have judgment for the amount sued for, interest, and costs.

*H. Cassels*, K.C., for the plaintiffs. *L. F. Heyd*, K.C., for the defendant.

Morson, Jun. Co., C.J.]

[March 23.

REX v. HENDERSON.

*Medicine and surgery—Ontario Medical Act, R.S.O. 1897, c. 176, s. 49—“Practising medicine”—Osteopathy—Treatment—Conviction—Evidence.*

An appeal to the 1st Division Court in the county of York, by Robert B. Henderson, the defendant, an osteopath, from a conviction dated the 14th December, 1909, made by George Taylor Denison, police magistrate for the city of Toronto, of the defendant for practising medicine without being registered, contrary to s. 49 of the Ontario Medical Act, R.S.O. 1897, c. 176, which is as follows:—

“It shall not be lawful for any person not registered to practise medicine, surgery or midwifery for hire, gain, or hope of reward; and if any person not registered pursuant to this Act, for hire, gain or hope of reward practises or professes to practise medicine, surgery or midwifery, he shall upon a summary conviction thereof before any justice of the peace, for every offence, pay a penalty not exceeding \$100 nor less than \$25.”

MORSON, JUN. CO. C.J.:—The material facts are shortly these. Two private detectives, Kissock and Gadstein, employed by one Charles Rose, the prosecuting officer of the Ontario College of Physicians and Surgeons, went to the offices of the appellant on three occasions for treatment, for which they paid, falsely alleg-

ing they were ill and did not know what was the matter. Gadstein said the appellant made him take off his coat and waistcoat; he then manipulated his back by rubbing with his thumbs up and down the spine two or three times; he found a lump, so he said, and attributed it to his bowels being out of order; he asked him how his bowels and kidneys were working; he then made him lie down on his side on a couch or operating bench, and rubbed him again up and down the back pressing hard, and turned him over and rubbed his stomach, and turned him back again and then on his side, and lifted him up bodily twice and stretched his neck, twisted it from one side to the other; he also used an electrical knob, running it up and down his back; he told him to avoid stimulants and eat very little and drink plenty of water to wash out the system. On the visit to his house he made him strip and sit on a stool, and went through very much the same thing, and, when he complained of a pain in the neck, he told him he had caught cold. He then examined his heart with a stethescope, and told him it was beating rather slowly. Kissock in his evidence corroborated Gadstein. He was told his system had been poisoned, and that some medical men would call it pleurisy and give him medicine; but the appellant said he would not, that his method of working was to put the system in a proper condition and let nature do her own work; he also told him to take plenty of exercise and to be careful of his lungs, and that his liver and kidneys were out of order. Dr. Graham Chambers, who heard the evidence of the two detectives, said that what they were told would be what ordinary practitioners would tell their patients; he said they also advised as to the essentials of health, such as moderation in eating and fresh air, and sometimes give medicine and sometimes not; that the administering of medicine was not necessarily a part of the practice of medicine. On cross-examination, he said he would not diagnose kidney or liver disease by merely feeling a patient's back, that what the appellant did was not a diagnose of liver or kidney disease; he further said that medical men did not apply massage, but called in a masseur; that they sometimes practised passive movements only, but it was not general.

On these facts the appellant contends that he was not practising medicine contrary to the Act, because no medicine was prescribed or used. It is quite clear on the evidence that no medicine was used. The treatment adopted appears to have been for nothing in particular, and was what might properly be called physical treatment, as distinguished from the prescribing

of medicine; there was no proper diagnosis of any particular disease, no advice given except in a very general and harmless way, only such as would be given by any one outside the medical profession who was possessed of ordinary common sense and sufficient intelligence to permit nature to be her own physician. The so-called diagnosing and advise and examination of the heart were merely incidents in the treatment, forming in fact no part of it, the substantial treatment being the rubbing of the body and spine, a treatment which is not usually, if at all, adopted or practised by medical men, and which is apparently known as osteopathy.

Is then the practising of osteopathy (if this is the proper term to apply to the treatment in question) the practising of medicine contrary to the Act? On the evidence in the present case, and following *Regina v. Stewart*, 17 O.R. 4, I am of opinion that it is not. In that case the defendant neither prescribed nor administered any medicine, nor gave any advice, the treatment consisting of merely sitting still and fixing his eyes on the patient. Mr. Justice McMahon, after defining the word medicine, says: "To practise medicine must, therefore, be to prescribe or administer any substance which has, or is supposed to have, the property of curing or mitigating disease." See also *Regina v. Hall*, 8 O.R. 407; *Regina v. Howarth*, 24 O.R. 561; and *Regina v. Coulson*, 27 O.R. 59—in all of which cases medicine was prescribed or used. There appears to be no case holding that medicine can be practised without the use of medicine. In *In re Ontario Medical Act*, 13 O.L.R. 501, which was a reference to the Court of Appeal by the Lieutenant-Governor in Council as to the construction of this s. 49, a majority of the learned judges expressed the opinion that there might be the practising of medicine without the use of medicine, provided the treatment or method adopted was such as is used by medical men registered under the Act, and this opinion I adopt. They did not, however, so decide, it not being their province to do so under a reference of that kind; they were only to advise what the law was, not to decide it. Chief Justice Moss and Mr. Justice Garrow said they were to be guided in giving their opinion by the decided cases, and that it was not for them to say whether they ought to or might not have been decided as they were. This case then left the law as it was in the cases I have referred to. If, however, the law had been changed, and it had been decided in accordance with the opinions expressed, I think, even then, the treatment and method adopted by the appellant was not such as

is used or adopted by medical men, and there would still be no violation of the Act. If the Ontario Medical Council desire the meaning the word "medicine" extended to cover the present case, they must apply to the Legislature.

As Mr. Justice Meredith says in *In re Ontario Medical Act*, if the medical profession and the public want protection from osteopaths, Christian Scientists, and others of a like class they must obtain it by an Act of Parliament.

For the reasons, then, that I have stated, the conviction is wrong in law, and I quash it with costs.

*Glyn Osler*, for the appellant. *J. W. Curry*, K.C., for the respondent.

## Province of Nova Scotia.

### SUPREME COURT.

Graham, E. J.]      WINFIELD *v.* STEWART.      [Dec. 23, 1909.

*Collection Act—Contracting debt and disposition of property—Order for discharge sustained—Costs.*

Defendant contracted a debt at a time when he had reasonable expectations of being able to pay. There were no fraudulent circumstances in connection with the disposition of the property purchased, defendant's expenditures did not appear to have been extravagant and his disposition of his property acquired otherwise than through the creditor was sufficiently accounted for. After an examination held under the provisions of the Collection Act, under the circumstances mentioned, an order was made by the Commissioner discharging defendant.

*Held*, that the order was rightly made and that plaintiffs' appeal must be dismissed with costs, but that defendants' costs must be applied in reduction of the judgment against him.

*Power*, K.C., in support of appeal. *T. F. Tobin*, contra.

Laurence, J.]      [Dec. 30, 1909.

BELL ET AL. *v.* SMITH ET AL.

*Partnership—Winding up—Evidence on appeal—Estoppel.*

Co-partnership articles between J. S., E. S., and A. S. provided that in the event of dissolution by death or retirement of any partner, the remaining partners, wishing to continue the

business, might purchase the share of the deceased partner at a valuation to be fixed by arbitrators.

The last will of J., one of the members of the firm provided that his interest in the business should be converted into money and that his executors should collect therefor the sum of \$10,000 annually until his whole interest was realized.

In an action to set aside an award on the ground that it was bad on its face,

*Held*, that it was not competent on the trial to hear evidence touching the merits which was or could have been presented to the arbitrators, or which would have affected their judgment in coming to the conclusions reached by them, particularly where plaintiffs relied on the invalidity of the award on its face.

Defendants, after taking over the business after the death of J.S., made payments under the terms of the will and continued to do so down to the time of the making of the award, and after that made payments under the award.

*Held*, that the acceptance of the payments so made concluded plaintiffs from maintaining the action and disputing the award.

*W. B. A. Ritchie*, K.C., and *Mellish*, K.C., for plaintiffs.  
*Harris*, K.C., and *J. J. Ritchie*, K.C., for defendants.

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Full Court.]

[Jan. 26.

THE MUNICIPALITY OF HALIFAX v. FREDERICKS.

*Highway Act—Time for performance of Act—Provisions held directing and not mandatory.*

Defendant contested his liability to pay a certain road tax or to do commutation work in lieu thereof, on the ground that the Highway Act required the labour in question to be performed between the 1st day of April and the 31st day of July in each year, and that the notice calling upon defendant to pay the tax or to do the commutation work was not given until the 31st July, and called upon him to do the work or arrange for the commutation, on the 9th day of August.

*Held*, affirming the judgment of the County Court judge for District No. 1, and the judgment of the stipendiary magistrate for the county of Halifax, that the provisions of the Act were directory and not mandatory.

*O'Hearn*, in support of appeal. *Mackay*, K.C., contra.

Russell, J.]            THE KING v. HARDWICK.            [February 24.  
EX PARTE EDWARDS.

*Intoxicating liquors—Canada Temperance Act—Proclamation bringing into force—Judicial notice.*

On application for an order for a writ of certiorari to remove into the Supreme Court a record of conviction made by the stipendiary magistrate of Annapolis Royal for a violation of the Canada Temperance Act, on the ground, among others, that the magistrate had no jurisdiction because there was no evidence before him that the Act was in force.

*Held*, refusing the application, that in such cases the magistrate is compelled to take judicial notice of the proclamation in the *Canada Gazette* bringing the Act into force, and that his power to take such notice is not restricted to cases where the matter is brought to his attention by the prosecutor.

*Milner*, in support of application. *J. J. Ritchie, K.C.*, contra.

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Laurence, J.]            [March 11.

RE MARKLAND PAPER CO., IN LIQUIDATION.

THE ST. CROIX PAPER CO., CREDITOR.

*Landlord and tenant—Company in liquidation—Claims for repairs and rent.*

The St. Croix Paper Co. leased certain premises described, including their mills, etc., to S., as trustee for the Markland Paper Co., then in process of formation, for the period of five years, commencing the 1st day of February, 1909.

The Markland Co. went into liquidation on the 5th January, 1910.

*Held*, that St. Croix Company was entitled to recover against the company, in liquidation, for repairs which the latter company was required under the terms of the lease to make, and also for rent to accrue due under the lease, the latter being a provable claim under the Winding-up Act, R.S. 1900, c. 129.

*Allison*, for the creditor. *Murphy*, for the liquidator.

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Laurence, J.]            RE PISTONI AND DEPENTI.            [March 17.

*Intoxicating liquors—Applications for licenses—Power of council to consider individually or en bloc.*

A number of applications for licenses to sell intoxicating liquors, under the provisions of the Liquor License Act, R.S.

1900, c. 100, were considered by the inspector for the city of S., who presented his report to the mayor and council dealing particularly with each application by reporting against them all.

The council, without considering each application separately, adopted the report of the inspector, thereby refusing them all.

Held, that it was in the discretion of the council whether to dispose of the applications separately or en bloc; that as the council had the discretion to refuse an application even where the applicant had complied with all the provisions of the law and no personal objection could be urged against him, they might exercise that discretion in respect to all the licenses or any number of those applied for by one act or resolution.

O'Connor, K.C., in support of application. F. McDonald, contra.

## Province of Manitoba.

Full Court.]      LAWRENCE v. KELLY.      [January 17.

*Negligence—Master and servant—Defect in system—Accident to workman—Negligence of fellow workman.*

The plaintiff, a structural iron worker in the employ of the defendants, while working under the direction of an experienced foreman believed by the defendants to be a competent man, was severely injured by the falling of a steel column set vertically upon a cement pier to which it was fastened by split anchor bolts through the flanges and holes drilled in the pier. Plaintiff had been sent to the top of the column to assist in connecting it with a horizontal steel beam at a height of about 25 feet. The case was tried without a jury by a judge, who was unable to find whether the falling of the column had been caused by the faulty construction of the pier or by defective filling in of the holes with cement after the bolts had been driven in or by the dropping out of the wedges in the lower ends of the bolts, so that the bolts did not spread out at the bottom, or by sending the plaintiff to the top of the column before the cement had sufficient time to harden properly.

It was only as to the last of these suggested causes that there was any evidence to shew knowledge on the part of the defendants that the work was being done improperly and, if the fall of the column was from any of the other causes, the negligence was that of the foreman only.

*Held*, that, as the plaintiff's claim was based wholly upon a common law right of action, the rule of common employment applied, and he was bound to shew that the injury had resulted from some negligent practice on the part of the foreman of which the defendants were aware, and that, as he had failed to shew this, he could not recover.

*Bartonshill Coal Co. v. Reid*, 3 Macq. 290, followed.

*Smith v. Baker* (1891) A.C. 325; *Sword v. Cameron*, 1 Sc. Sess. Cas., 2nd Ser. 493, and *Pattersons v. Wallace*, 1 Macq. 748, distinguished.

Appeal from judgment of MACDONALD, J., noted vol. 45, p. 573, dismissed with costs.

*Trueman*, for plaintiff. *Galt*, K.C., and *Towers*, for defendants.

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Full Court.]                    WILLIAMS v. Box.                    [February 21.

*Mortgagor and mortgagee—Foreclosure—Real Property Act, R.S.M. 1902, c. 148, ss. 71, 113, 114 and 126—Certificate of title, effect of.*

Appeal from decision of MATHERS, J., noted in vol. 45, p. 491, dismissed, RICHARDS, J.A., dissenting.

*Robson*, K.C., and *Coyne*, for plaintiff. *Wilson*, K.C., for defendant.

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Full Court.]                    [March 2.  
SEYMOUR v. WINNIPEG ELECTRIC Ry. Co.

*Negligence—Street railway—Liability for injury to person risking his life to save that of another.*

A statement of claim alleging, in effect, that a child about two years of age had fallen on the track of the defendants' street railway on a public street in the city; that one of the defendants' cars was approaching the child at a high rate of speed, and that, owing to the negligence of the motorman in charge of the care in not stopping it, the child's life was endangered without negligence on her part, that the plaintiff, observing this, necessarily rushed in front of the car in an attempt to save the child, and that, owing to the motorman's negligence in not stopping the car or reducing its speed, he was struck and injured by the car, discloses a good cause of action.

*Eckert v. Long Island Railroad Co.*, 43 N.Y. 502, followed.

*Anderson v. Northern Railway Co.*, 25 U.C.C.P. 301, distinguished.

*Chapman and Cohen*, for plaintiff. *Anderson, K.C.*, and *Guy*, for defendants.

Full Court.]

[March 7.

WINNIPEG v. TORONTO GENERAL TRUSTS.

*Pleading—Counterclaim—Matter pleaded in anticipation of defence—Striking out pleadings as embarrassing.*

A counterclaim should not contain allegations set up only by way of anticipating the defence that the defendant supposes the plaintiff will make to it, and such allegations will be struck out as embarrassing with leave to the defendant to file a proper pleading in lieu thereof.

*Robson, K.C.*, for plaintiffs. *Wilson, K.C.*, and *McKercher*, for defendants.

Province of British Columbia.

Morrison, J.]

[Nov. 22.

GOLDSTEIN v. VANCOUVER TIMBER & TRADING CO.

*Practice—Amendment of writ on ex parte application—Neglect to serve order amending—Application to add liquidator as party—Steps in proceedings—Order 64, r. 13.*

An application, ex parte, to amend the writ by adding to the endorsement a description of certain real estate, is a step in the proceedings, although the amending order was not served on the defendants.

*Sir C. H. Tupper, K.C.*, for plaintiff. *A. D. Taylor, K.C.*, for defendants.

Bench and Bar.

The quarterly dinner of the Belleville Bar Association was held at Belleville, on March 16th, the president Mr. W. N. Pon-ton, K.C., in the chair.

The Honourable Mr. Justice Teetzel was present, and in responding to the toast of his health referred to the early history of the Law Society of Upper Canada and to Chief Justice Osgoode, after whom Osgoode Hall was named, and spoke in eloquent terms of the prominent part played in public life by

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the Bench and Bar of Canada. He referred also to the re-adjustment of the tariff of costs of solicitors to modern conditions, and the proposal to bring together more closely the educational work of the Law Society with that of the University of Toronto.

Mr. N. S. Morden, in proposing the toast of the County Judiciary, referred to the protection afforded to the members of the medical profession at the cost to them of about \$2.00 a year each, while, as he claimed, the legal profession were not protected though the members paid about ten times that amount.

Colonel Lazier, as Master in Chancery, replied to the toast and attributed much of the good feeling that existed between Bench and Bar to the quarterly social gathering of the members.

The toast of "Our Guests" was acknowledged by Mr. Hugh E. Rose, K.C., whose father, the late Mr. Justice Rose, spent several years of his early career in Belleville; Mr. A. B. Colville of Campbellford, Mr. A. A. McDonald, and Mr. Emerson, the veteran Official Court Reporter. Among others present who contributed to the enjoyment of the evening were: Mr. Mallon, inspector of legal offices; Mr. E. G. Porter, K.C., M.P.; Sheriff Morrison, Mr. J. F. Wills, Mr. E. J. Butler, Mr. N. Carney, Mr. M. Wright, and Mr. W. Jeffers Diamond.

Mr. F. E. O'Flynn ably filled the position of vice-chairman, and excellent speeches were made by the younger members of the profession, especially Mr. R. D. Ponton, Mr. N. Jones, Mr. P. M. Anderson and Mr. E. T. O'Flynn.

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### United States Decisions.

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MORTGAGES.—Foreclosure: The rule that a debtor making voluntary payments may specify upon which debt they shall be applied, does not apply to the application of the proceeds of sale of mortgaged property.—*Bank of Defiance v. Ryan*, Iowa 123 N.W. 940.

LANDLORD AND TENANT.—Injury to Tenant's Goods: A landlord in a lease held not liable for leakage of the roof simply because the roof was in bad condition ascertainable by the exercise of ordinary care. *Pratt, Hurst & Co. v. Tailer*, 119 N.Y. Supp. 803.—Lease: The leniency of a landlord in not insisting on prompt payment of the rent does not constitute a waiver of his right to forfeit lease for non-payment.—*O'Connor v. Timmermann*, Neb. 123 N.W. 443.

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## *THE ART OF CROSS-EXAMINATION.*

Mr. E. F. B. Johnston, K.C., at the recent annual meeting of the Ontario Bar Association, delivered an address on the Art of Cross-Examination in which he has crystallized the experience of half a lifetime spent in the practice of one of the most difficult and delicate arts. He has shewn rare candour and goodwill, since it is seldom that a great artist can be induced to set forth, for the benefit of others, the principles and methods which he has followed in his work. These principles and methods are not to be learned from text-books or reports, but from a patient, labourious and protracted study of human nature, its motives, passions, prejudices and limitations as disclosed in the witness box. Mr. Johnston has performed a real service to the profession, and his address, which is delightfully interesting as well as instructive, is well worth careful study by every advocate who wishes to rise above aimless, slipshod and mere playing-to-the-gallery methods of cross-examination. The text of the address, which we are glad to be able to publish, is as follows:—

Mr. President and Members of the Bar,—It is an honour to be asked to say something at the meeting of such an important body as the Ontario Bar Association is, and when you, Mr. President, asked me if I would be good enough to deliver myself upon some particular subject, I readily acceded to that request because there was no lack of subjects. If I had been left to my own devices I would have chosen one of easier essay and simpler character. But when you, sir, suggested that I should address the members of the Bar upon the Art of Cross-Examination I found then that the lack consisted, not in the subject, but in the material which should be used to make that subject presentable to a cultured and professional audience. I may be pardoned, perhaps, for saying that my own native modesty prevents me from expressing a hope

even that I shall say anything of a very startling, or, after all, of a very new character. All that I am going to say must be the crystallizing of my own experience and the observations that I have been able to make in hearing the efforts of others in the art of cross-examination. Indeed, I feel very much as the expression indicates, that was once used by Disraeli in the House of Commons after a two-hour speech by a member upon an important Colonial subject. He was replied to by the then leader of the Government, Disraeli, whose speech was noted for its brevity and point. He said, "that the honourable gentleman who had just addressed the House had said a great many true things and a great many new things, but unfortunately the true things were not new, and the new things were not true." Now, I hope, however, that I shall be able to say a few new and true things, referring to them as I go along, and make the address I shall give as practical and as much to the point as possible.

I have avoided, or will endeavour to avoid, the anecdotal stage of cross-examination, because instances of great examinations are often the result of the moment and a combination of circumstances which may never arise again. But I do think that the art of cross-examination may be resolved into certain well-defined, if not well-known, principles, and that the bearing in mind of these principles may be of some advantage to the younger men who are all, of course, looking to be great cross-examiners before they retire from professional life.

The subject, it is needless to say, is one of grave importance in the conduct of law cases—important, because it deals with the separation of truth from falsehood—important because it enables the court to be seized, or ought to enable the court to be seized, of all the circumstances of the case bearing upon the issue which the judge or jury may be called upon to try. Then another peculiar phase of it—we all recognize it, perhaps, as doubly important and as an element in a legal trial—is that it deals largely with the undisclosed. The evidence in chief, as you all know, is briefed; the evidence of the cross-examination is briefed only in the mind of the cross-examiner. Cross-examination properly

conducted becomes important in another way. It exposes bias, detects falsehood, and shews the mental and moral condition of the witnesses, and whether a witness is actuated by proper motives, or whether he is actuated by enmity towards his adversary. But, perhaps, one of the most important bearings it has is that it either corroborates your own client's version of the issue or it weakens your adversary, and here I may say is one of the cardinal elements of cross-examination. Unless you corroborate your client by your cross-examination, the chances are very largely that you strengthen the hands of the adversary. Indeed, it presents, if properly carried out, the case in an entirely new light. You hear the evidence in chief passing away without any cross-examination—that is one case—but when you hear a successful cross-examination of witnesses, the case presents a totally different aspect, and may be so developed that it comes to be in favour of your client, instead of being in favour of the person on whose behalf it was given. Now, having said this much with regard to the importance of it, let me say a word about the difficulty of it—and here is where I find myself somewhat at sea in dealing with a question of this character. Cross-examination cannot be learned; there is no royal road to the successful cross-examiner. There is no means by which the cross-examiner may become perfect in his art. Experience does a great deal, observation perhaps, does more, knowledge of human nature is, perhaps, greater than the other two combined, but there is no way in which any man at the Bar can sit down and study out cross-examination as a science in the same way as he can study the law, or the legislation of his country from a scientific standpoint.

It has always occurred to me that to a great extent cross-examination is intuitive, just as music is, just as painting is, and whilst the amateur beginning his music or his painting may not be very successful, for it requires training, practice and experience, and by and by he develops into a great musician, or a great artist, but in order to do that he must have the intuitive genius, and the faculty for that which he is doing, otherwise he will always remain an unaccomplished musician or a mediocre artist.

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Even genius sometimes will not be developed along the line of study or thought or education. Education itself requires a vast amount of experience to make it effective in the hands of the cross-examiner. Then, as I said before, it becomes more difficult by reason of this fact that there must be a very delicate, sensitive, and very extensive knowledge of human nature. There must in addition to that be a very extensive knowledge of the ordinary business and personal affairs of human life, because it is by this and this alone that we reach the motives, the passions and the methods of the witnesses.

Having said this, it follows as a natural consequence that many able lawyers fail as cross-examiners. A man to be a cross-examiner does not necessarily need to be an able lawyer technically. You know from your past experience, and from looking over the records for the last 30 or 40 years, that there have been many of the ablest lawyers who could not cross-examine upon the simplest possible point. Then it is most important by reason of what we daily see, by reason of the apparent facts at every court, namely, that many cases are lost by lack of proper cross-examination, and I am sorry to say, that more cases are lost by too much cross-examination. The whole system is like a piece of delicate machinery; the skilful hand knows when to turn on the power, when to withdraw, when to change the angle or the volume of force, and having such a complex mechanism before me, it is no wonder that I approached it with a good deal of hesitation and with the thought of preparing something more in the nature of an essay than a speech from notes however copious. However, I was afraid to prepare a speech and write it out because the story of the old Presbyterian minister was in my mind when he, to the chagrin of some of his followers in his tribulation sermon, read it, which was rather opposed to the feeling of the parish people, and he asked his elder after the sermon how he liked it, and he said he didn't like it at all. He wanted to know what objection he had, and the elder said: "I have three objections, first, you read your sermon; secondly, you read it very badly; and the third is, that it wasn't worth reading." Now,

that was the trouble I felt myself in, and I am rather impressed with the idea that perhaps what I have to say may not be worth saying, at any rate I am satisfied it could be scarcely worth reading to such an audience as this.

For a moment let us look at some of the methods of cross-examination, as they are practised, in the same spirit as we often hear about English as "she is spoke." One form of cross-examination which is apparent to all of us as being very ineffective, is the going over of the ground in chief. I have seen very able counsel (and without being able at all, I have done it myself, to my sorrow) take a witness, the plaintiff or the defendant as the case may be, and follow him from point to point, going over his case as developed in chief, with what result? Invariably emphasizing and giving point to the story of the witness.

Then another form which some people adopt seems to be the asking of questions at random without an objective point, and I shall deal with that more fully in a moment or two. The cross-examination in a case of that kind always appeals to one as being all abroad and ineffective. Another form which one notices very frequently, and it is done, of course, without thought, sometimes done in the absence of something better to ask, and that is the cross-examination on facts that cannot be weakened—bald, salient facts about which there is no dispute, and yet I have heard cross-examination by the hour upon those facts which no man, not even the all-powerful judge on the Bench could shake—an examination, you have all heard it—entirely devoted to attacking those particular facts. That is due to a curious psychological condition arising from the very strength of the facts, and the cross-examiner becomes irresistibly impressed with the idea that these are the things he must attack, the very things that a wise cross-examiner would fly from, would not touch under any circumstances.

Then there is another form which is rather a fishing form, that is a cross-examination upon an irrelevant matter in the hope of getting something valuable, one of the most dangerous things a cross-examiner can do, for this reason. Of course, it may be a

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truism, it may be old and well-known to all of you, that it is a fact. But why dangerous? The reason is that when you begin to cross-examine upon an irrelevant matter the judge stops you at once, or as soon as he possibly can. That weakens your power at once with the witness; the jury favours him; the jury is not impressed with that condition of things, and where the judge stops the cross-examination because the examination is irrelevant, or upon an irrelevant matter, the jury naturally and very quickly come to the conclusion that you have got no case.

Another form of cross-examination, and I may include the whole of us as being guilty of it occasionally, and that is, the cross-examination on details that are not important. Assuming that you prove something by examination of particular details, ask yourself, "Now, if I prove that fifty times over will that affect the judicial mind or will it affect the minds of the jury who are finally disposing of this matter?" If it won't, then drop it. Leave it out immediately. Another very common kind of attack upon a witness by way of cross-examination is the assumption that the witness is telling a falsehood, that he is a false witness, one of the most dangerous presumptions to work upon, because 90 per cent., nay, I hope 99 per cent., of the witnesses who go into the box to give evidence upon their oath are people who are not telling falsehoods, who are not telling anything, but what they honestly believe to be the truth.

There is another form of cross-examination which must be avoided; that is the distorting of facts. Nothing weighs as much with the tribunal, I care not whether judge or jury, than the act of counsel who seeks not to accept the facts with qualifications, but who seeks to distort the facts in order that the fact may mean something less or more than it should mean.

Then there is another very common thing, and that is laying traps for witnesses. I think that in the whole course of over 30 years' experience I have seen about two traps go off. This is a thing that I would advise my brothers at the Bar, and particularly those who are engaged in litigious practice, to avoid. It is rarely successful, and if it is not successful it always comes back

upon the poor cross-examiner, and through him upon his still poorer client.

What is the object of cross-examination? Just for a moment let us consider that, and let me put it in plain, simple English. The object of cross-examination from a litigious standpoint, not from the high moral ground of getting at the real truth and exposing falsehood and all that, but from the purely litigious, professional standpoint, may be stated as follows: First, it is to get something, no matter how small, to help your own case. If you fear further examination is dangerous and absolutely fruitless, far better leave it alone, far better to stop the witness if you feel that what you are getting is not as a fact aiding or assisting your client in the litigation. Another object is when you cannot get that which helps your client, try to get something to weaken your opponent, but that is got by a different process entirely; and the third—I put it last, although it is not the least by any means—is to endeavour, if you can, to separate the truth from the falsehood, more particularly if the truth told by your opposing witnesses would be of assistance to your case—for no cross-examiner is a common prosecutor to discover wrongdoing. Now, how should we best attain this object; in what way are we going to further the interests of cross-examination? In order to give an answer to that it will be necessary to consider for a moment, what evidence is—and I don't propose to enter upon any disquisition as to what evidence is or is not, in a legal or technical sense, but what I want to point out for the purposes of cross-examination is that evidence is not facts, but is the impression of facts, and the result of certain facts or certain things which have happened. Now, the object of cross-examination is to reform these impressions, to minimize them, to explain them, to question them if you will, to doubt them if you will. But the facts themselves are something quite apart from the evidence. There are no facts in evidence at all, because, as I have said, evidence is merely and mainly a record of facts expressed through the witness box. In law and in the trial of a case, as you all know, facts are the result of evidence and are found independ-

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ently of witnesses or anybody else; that is, the judge or the jury has the mental impressions given by the witness of what he saw or heard and given to the best of his ability. The tribunal then finds the facts upon these impressions conveyed through the witness box. Now, it is important that these impressions should be watched closely in the trial of every case, and the impression of every witness in regard to the way in which he records and expresses his facts. I can illustrate it better, perhaps, in this way. By taking an imperfect photograph camera or a perfect camera improperly handled, your results depend on certain conditions. You get a photograph at a certain angle, it distorts the facts; the film is defective and it creates a wrong impression, and gives a wrong impression of the fact—unless it is properly and perfectly handled, the perspective is entirely wrong, and the whole subject is as one would say, "out of drawing." Well now, apply the photograph to the mental conviction and to the mental record; you have the angle of bias, perhaps the perspective of observation; you have the question of enmity creating a cloud or defect upon the mental film. You have the lack of opportunity in the witness as another defect in regard to his impression, and the result is that instead of getting a true picture of what the witness saw or heard, you are getting a picture which may be distorted, taken at the wrong angle, with the perspective and subject out of drawing. You may get that picture in the witness' mind, presented through the witness box, and presented honestly and fairly and conscientiously on his part. Now these impressions, in the aggregate, enable, as I said, the tribunal to get at the facts and it is the duty of the cross-examiner, it is, indeed largely, the only object of the cross-examiner, to ascertain just what the condition was, just what the mental impression was, and how it was affected by the surrounding circumstances. I can give you an example. A great many years ago when I was much younger at the Bar than I am to-day—and it illustrates my point, perhaps, better than anything I can say—there was a case tried before His Honour the late Judge McDougal. The man was charged with burglary. Now here were

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the facts presented by the witnesses: A man was seen coming from the back door of a place in Toronto late at night within the burglarizing hours; his identification—there was not much question about that; his manner and conduct were such as to cause comment by the officers who took him in charge; he was evidently in great haste to escape from the house; he was arrested, unable to give any satisfactory account of himself at the moment, and some tool or other was found in his coat pocket, and the man was arrested charged with burglary—the case of the Crown apparently absolutely complete. Now that man might have been convicted and might have served his term—a perfectly plain case, but it developed on the cross-examination of certain witnesses for the Crown, and upon the evidence which was given for the defence that this was what happened: that this man was a friend of the servant of the house, that he had been in there spending the evening, and by some accident or another he had left the door open, that he was a man of very excitable temperament, and that he had, just before leaving, a row with this servant; he was running to catch a car because it was late at night, and he had to catch one before a certain time, that he was a mechanic, and he had a certain implement, a wrench or something of that kind in his pocket at the time of his arrest. In the witness box the witnesses swore to damaging evidence and the outward facts seemed to be perfectly honest, but they were at the wrong angle; the witnesses had received these impressions through a wrong perspective, and the result of it was, as I understand the case, that if it had not been for the righting of the evidence in that way or in some other way the man would have been convicted.

Then take another case and I shall be through with examples, because this is a very common case, one that is tried every day in the courts, that is, ordinary negligence on the street cars or other vehicles of that description. Now, as a rule, in that case the facts are practically undisputed, but the issue turns upon one particular circumstance, usually the rate of speed, and I am taking that just as an example. The men concerned with

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the car movement swear that the car was going at six miles an hour. The man who doesn't understand the street railway system in Toronto, or at any rate, who hasn't had very much experience perhaps in cross-examination, will press the witness to increase the speed to 10 or 12, and by the time the examiner is through the witness has got it down to 5, thus shewing the danger of cross-examination. That is a fact which I have seen on more than one occasion. Now, see how near the evidence is to the facts, and what the cross-examiner should do with it. Take the collaterals. You take the trip the car had to make in the time allotted for the purpose; you take what the mortorman, or whoever he might be, was doing at the particular moment; you test him on his observation and his chance of observation—his opportunity. You shew that perhaps he had no cause to note the speed until after the accident had happened, not before. Then, there is always the question of the fear of dismissal, which would be important. Now, these facts are impressions, if I may call them facts, that is, the collaterals are impressions, and it is the duty and the business of the cross-examiner to ascertain them from his witnesses, leaving the question of speed to the witness himself. Now, that evidence as to the positive fact is due of course to a very common cause. As witnesses we study the facts, but our natures and our dispositions, and often our consciences, are more or less blurred. We may be trying to do the best we can and to tell in the witness box the very truth and nothing but the truth. The only way you can reach the true object of a cross-examiner is to ascertain from your witness the correctness, not of the fact deposed to but the absolute correctness, if you can, of the impressions from which he draws his conclusion of fact. Now, this means what? It means a great deal more than many of us very often pay attention to, and I shall try and explain it. It means the most careful preparation—a man will prepare the heads of his speech to a jury, he will often be rash enough to prepare the heads of an address to the members of the Ontario Bar Association—but few people, I venture to say, sit down and spend an hour or two hours or a day, if necessary,

summarizing and considering what method he should adopt with a particular witness in a particular case. The only way in which a man can ever hope to be a successful cross-examiner is to prepare and not wait until the moment, expecting favourable circumstances which will arise occasionally. I look upon the preparation for cross-examination as being infinitely more important, if there is a serious dispute about the facts, than the preparation of a brief. You have seen men who have gone into the witness box, you have seen them in the city of Toronto and elsewhere, who have told a story absolutely, and apparently straight and frank, and manifestly without any equivocation or any feeling of any kind whatever. You have seen that man leave the box, a wholly discredited witness. Why? Not cross-examined by the man who takes his brief and makes his notes on the margin as the witness goes along, but cross-examined by the man, whoever he might be, who has devoted hours and hours of preparation to that particular witness and who knows exactly his line of conduct and the way in which he should proceed with his art of cross-examination.

Now, I should say that the one great object is to avoid any complications with the positive facts. The way to do the work in that respect would be for a man to marshal his collaterals, to see what the bearings of these collaterals are, whether it is scientific, mechanical, or ordinary, everyday occurrences. Let him study and work out the problem, let him prepare his headings and methods carefully. In these days, of course, we all know pretty well what is coming on at a trial. We have our discovery, we have our witnesses; we all know what line the man is going to take. If a counsel will only devote himself to it, and will spend an hour or two, or a day, if necessary, to prepare his method of the cross-examination of that particular person, he will find that in every case he has accomplished infinitely more than he could possibly do, no matter how crafty he may be, by trusting to the spur of the moment. I can only say that as far as I am concerned—and I don't profess to be more skilled than anybody else—I can only say that in many, many cases I have spent more than

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a day, yes, I may say two days, in some particular case, where there has been an important witness, actually preparing for a cross-examination to the exclusion of everything else in business, where the issue depended largely upon the testimony of that witness.

In preparing, one has to consider this. You have to think out the end of your method. It won't do to say, this will be a clever way of putting it, or, that will be a good subject-matter of attack. The question is, Where is it going to lead you to at the end? Consider the character of the witnesses and the nature of the case, and above all we should consider the relation of the facts to each other. I have seen it—an instance does not recall itself to my mind at the moment—but I have seen where the cross-examiner has proved the fact to his satisfaction, and proved another one to his satisfaction, and with these two facts, by reason of their relation to each other, he has absolutely destroyed the efficiency of his work; therefore, it is necessary always to consider what the relation of these facts is to each other—what is probable and what is improbable or unlikely. These are matters which every cross-examiner must keep in his mind.

Then, I should say in cross-examination it is important to eliminate any concern about your own case, because the moment you are thinking about what your case is or will be, or what effect the evidence will have on your case, your mind is distracted from a subject which requires singleness of eye and purpose, and singleness of mental action. Then, I think, it is very important that we should determine a line of attack on each point. Sometimes we have to employ different methods, as you all know, to get at results; sometimes one line of attack would not suit in another; as you know, one line of cross-examination would not apply to another case at all; and, therefore, we have to so prepare and so put down on paper—and I think it is important that everything should be put down on paper,—that the eye as well as the mind will see where the thing is leading you to, that is, to prepare so that the bearing and the result are clear to the mind of the examiner. Method, of course, is largely governed by the

moment, and in that I have a short quotation here which covers the point better, perhaps, than I can say it to you, and this deals, with a counsel in the very act of cross-examining. "Be mild with the mild; shrewd with the crafty; confiding with the honest, merciful to the young, the frail or the fearful; rough to the ruffian and a thunderbolt to the liar. But in all this never be unmindful of your own dignity. Bring to bear all the powers of your mind, not that *you* may shine, but that *virtue* may triumph, and your *cause* may prosper. Like a skilful chess player, in every move fix your mind upon the combinations and relations of the game—partial and temporary success may otherwise end in total and remediless defeat."

Now, we come to the trial, and there are certain plain rules that must be apparent to most people; but yet I think the remarks upon the art of cross-examination would not be complete without some reference to them. A man may become energetic, he may apparently become scornful or satiric, or he may apparently become angry, as a cross-examiner. But the golden rule of all cross-examination is, *Never lose your temper*. There is no time in the practice of the profession, there is no incident in the history of our lives that requires a more calm, a more cool, and collected mental condition than that in which the cross-examiner is placed. And it might be that I can go on very usefully with a series of "Don'ts" in this connection, but I have only one or two don'ts noted; and these are: Don't expect a witness to fall into any trap, no matter how skilfully it may be prepared. Don't expect that you are going to smash any witness—and when I use the word "smash" I use it in the ordinary colloquial term spoken of by lawyers in conducting a vigorous cross-examination. The man who goes into the court with his brief, I care not how eminent a counsel he may be, I care not what his experience may be, I care not how good a case he may have, if he goes into court with the idea in his head that he is going to smash a witness by cross-examination, that man retires from the field defeated in nine cases out of ten, and perhaps in a larger percentage. Witnesses are knowing people; they are crafty; they know more

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about their affairs and what they are talking about than you or I do; they have lived with them; they are people who are very quick of observation and they have a certain amount of cunning, and that cunning the most careful counsel sometimes is unable to circumvent even when the court and when the counsel are both convinced that the witness is not telling the truth.

Then again, one, in cross-examining, has always to keep the point in view. Immediately you lose sight of the point that you are immediately at, that moment your adversary is gaining a step or two in your direction. It is all very well to say, pick it up again. The golden rule is, when you get your point keep it, and don't let go until you are through with it. Another matter that I think counsel ought always to observe, and which I think we all ought to consider, and that is to overlook discrepancies that are not very material, because discrepancies are often the strongest evidence of truth; and yet I have heard counsel—not excluding myself—examine for want of something better to be asked, about discrepancies that I felt in my own mind if proved up to the hilt could not possibly affect the issue in the mind of the tribunal trying it. Then one has to keep not only his eye on the witness, but he has to keep his mind on the witness. The moment the cross-examiner begins to play to the gallery his client ought to discharge him and engage another. A man cross-examining, for the time he is actually cross-examining, ought to eliminate himself, ought to eliminate the public, ought to eliminate everything in the exciting moment of cross-examining, even to eliminating the judge and the jury. And so far as he is within his right and limit, and within his proper province his mind ought to be singly concentrated upon that of the witness, his eye ought to watch every move, and when he has made his progress with that witness, it is time enough for him to see whether it has satisfied either the judge or the jury. A man cannot do two things at once and do them both successfully. Further, a man should never shew disappointment. It is very hard to prevent it. When a man has a nice, carefully prepared case, and has led up to a certain point, and just when he thinks it is within his grasp, the witness goes

back on him and fires his volley, and counsel stands back staggered. It is a most dangerous thing. Juries observe—juries are quick to notice anything of that sort—that the witness was too much for the counsel—clever man but he couldn't handle that witness, clever man as he was and that therefore the witness told the truth. Why? By an unconscious process of reasoning, which may be fallacious, but is nevertheless convincing. Therefore I say, if a counsel gets an answer that staggers him, if it takes him unawares, his proper course and his only safe course is to advance smilingly and calm, and accept it as a compliment rather than a disappointment.

Then there is another very important matter, and it is a matter that I can not deal with in detail, but I think I should mention it, and that is, never risk under any circumstances an important question that is objectionable in form. Of course there is the old theory, never ask a question unless you are sure of the answer—but that would destroy a good deal of cross-examination. That is not the way in which I put it. I put it rather that no counsel should ever risk an important question unless he knows and feels the question is proper and right in its form, having regard to form only. I will tell you why, in my judgment, this is a dangerous thing: Counsel on the other side are waiting for an opportunity at every turn to ease off their client if he is in the hands of a skilful cross-examiner. Counsel gets up very often and objects. He is asked, What is your objection? "Well, I object to the form of the question." It may or may not be a good objection, but you have defeated by your objectionable *form* of question that which you have been labouring to obtain for 15 minutes or half an hour. How did you do it? The witness has stopped, but he has heard the question, and he is given a moment or two of thought, and he knows what you are driving at no matter how cleverly you have put it, and by the time you get back to the question, the witness has got his "wind," and you get your answer, favourable, of course, to the opposing party. Then as to a critical question, I should hesitate very much to ask a really critical question as a critical

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moment in the case, unless I was reasonably sure of what the answer was going to be. I would rather skirt around it. I would play with the situation if I could, I would rather avoid the main question, still leading up to it, unless I was reasonably sure that the answer to the question that was really critical was going to be in my favour.

The last and the best advice that any man can give, and the best and last advice that any man can take for his own good, is to stop when through—a thing that is seldom done. We have long examinations, caused by our present system of pleading, by the trial involving a very large number of facts, a great variety of evidence, a great many collateral matters, etc., all let in upon the ground that they have some bearing upon the issue, and the great desire on the part of the court and counsel to investigate the subject thoroughly so that there may be no question hereafter in regard to it. But if we could only nerve ourselves to this point, to make our examinations one-third as long as they are we would be very successful cross-examiners. I have often thought that there was a great deal of wisdom and philosophy in the old saying of Josh Billings, the almost forgotten American humorist, in which, in his advice to preachers, he said: "If you cannot strike oil in twenty minutes, you have either a poor auger or you are boring in the wrong place."

Coming to the closing remarks I have to make, there are two or three things which I have in mind more from observation than from any particular knowledge of my own, and I have put them into the form of rules, cardinal rules indeed, conveying a great deal more perhaps on thinking them over than they do on the first utterance.

The First is—and that is largely covered by some things I have already said—the examining counsel must have a *continuity* and *concentration* of thought. If he has not that he cannot cross-examine. By concentration I mean that which eliminates and excludes every other thought excepting the subject in hand, and the witness he is dealing with. By continuity I mean that it is not in broken patches, that his concentration is not fixed here

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this moment and somewhere else the next, but there should be continuity throughout the whole of his cross-examination. And that leads to the Second rule, which is, Never let the witness get away with you. You will see a witness who is being well cross-examined, but the witness whether through craft or unintentionally leads off into some other branch, and counsel follows him into that branch, and the counsel's work to the extent to which he had got before he was led away is practically nullified. If he had not permitted himself to be led away, if he had kept his witness to the point, if he had not allowed the witness to get the mastery of him and take him into some side issue, the chances are he would have done good work, but the moment the break is made, the moment the man gets the whip hand, and takes you away into a side issue your continuity is broken, your concentration is weakened, and the opportunity is gone that you perhaps have been striving to attain for half an hour with that particular witness. Then the Third cardinal rule that I should say should be crystallized is, Don't begin to cross-examine upon any point unless you have a good ground for gaining that point, and stop absolutely short when you gain it. Let me illustrate what I mean by that: A witness is called, and he is asked if he said a certain thing upon a certain occasion. In many, many cases the answer of the witness is. "No, I don't remember that I did." He asks again, "Well, think it over, didn't you say so and so?" "I don't remember. I don't remember anything about it." Counsel goes about three questions further, and the man says, "No, I never said it." Now, that is a thing that happens in almost every trial. If counsel had been satisfied to take the want of memory, whilst it may have been against the contention of the counsel, it may have been against his side of the case, it is infinitely better for counsel that a witness should not remember than that he should remember and swear point blank that he never said such a thing.

The Fourth rule is important as regards policy. It is one I have given a good deal of thought to, because one does not like to announce principles without consideration—I can only say I

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have tried it in my own cases, and when I have not done it, I have always thought that I would have been better off if I had taken the rule and followed it, and that is this: Always attack your witness in the *weakest* point at the opening unless it is some complicated matter involving long accounts or something of that kind. Always attack your witness where he is least prepared or protected. And the reason for that, when you come to think of it, is very apparent. When a cross-examiner gets up to put his questions the witness is more or less nervous. In many cases he has been told, "Oh, well, wait until John Smith or James Jones, the eminent K.C. gets hold of you; he will turn you inside out in three minutes." Well, Mr. Jones gets up, and the witness has some apprehension, he is a bit nervous; he is unused to your tone of voice, and there is a complete and sudden change of style in the method of cross-examining from the method of the examination-in-chief. There is no time at all for him to get his evidence in mind, and the first moment that you strike the weakest point of his testimony under these conditions, you strike when he is least prepared for it, because in a few minutes, even a nervous witness will regain his confidence, and he feels you are not such a tremendous man after all, that you cannot turn him inside out, that you cannot smash him, and that he can hold his own fairly with you. You ask him the same question in fifteen minutes after he has become prepared, and he has everything in his mind, he says, "Yes or no," and "I will explain that to you," and he will at once explain, whereas, if he had been attacked in the first place, and you caught him just at the moment when the sudden change occurred between the methods of examination, you might have got the answer that you were seeking, and very likely a true answer, because when a witness has his time to think, knowing that he is a witness there in favour of the man who calls him, naturally and without any malevolence or without any wrong-doing on his part, his mind intuitively and unconsciously gets a sudden twist or turn that is very difficult to straighten out.

Now the danger, as I have said, is in asking too much, and

it is infinitely better that we should ask too little than too much. There is another thing that I would like to throw out for the consideration of the members of the Bar, and it is this: Never ask for mere information, because if you do you are sure to get it. I have heard many very clever cross-examiners say to witnesses, "Well, I am only asking that for my own information," but the information came with a sting that the cross-examiner didn't expect. If it is information that the cross-examiner is seeking he should read an encyclopedia and perfect himself in the knowledge sought for through a medium other than the witness.

Another thing which I desire to point out is to keep out of the unknown field. The unknown field of cross-examination is full of pitfalls and full of trouble. A man who cross-examines well upon that which he knows or has reason to believe he knows, or that he thinks exists, and who cross-examines well upon that point, is doing his whole duty to his client and to his solicitor; but the man who ventures into an unknown field, the man who goes without a lantern to his path will find that the first head that runs up against a tree is the head of the cross-examining counsel. That is so by reason of the circumstances. I do not care who the witness is. Take the farmer from the plow, take the mechanic from the bench, and put him into the box and ask him to tell a story—these men, generally speaking, although they look simple, and they are simple in their ideas, and they are limited, perhaps in their knowledge of many things—these men in nine cases out of ten, make the very best witnesses. Why? Because they are generally familiar with all the ins and outs of the subject-matter; because they know the ways of living, the methods of life, the peculiarities of that kind of life, and they know what is likely to have occurred, or what might have occurred under a set of given circumstances; they are familiar with the case, more familiar than the counsel.

Then let me strongly urge upon the members of the Bar here who take their own cross-examinations never to attack a man's character unless they have it of record. I do not know how often

in the course of my own experience, which has not been altogether limited, I have been told of a state of facts regarding character which my client supposed he was correctly representing to me, but which he was not, and at the trial I have been met with a condition of things on the part of the witness that absolutely turned the jury in his favour. Therefore, I say, it is important that if you know the record, if you have convictions against the witness, and if they are within two or three months, or even within six months, it might be safe to ask him if he has been convicted of a certain offence; but if a man has been convicted ten or twelve years ago, has served his term in the penitentiary and has come out, and is living a clean, respectable life, no counsel will ever advance the interests of his client by asking that man if he was ever convicted.

Then it is a dangerous thing to ask men—I won't say that about women—if they have any feeling or any enmity or any bias against another. They invariably answer, "No, we had a few words, but I am very friendly with him, and I would do him a good turn; he and I are not just close friends, we are friendly enough." You will sometimes get a woman who will be vindictive against her fellow-woman; but I have never seen a case where a man in the witness box has acknowledged that he was living at enmity with the litigant in the suit.

Then there is another branch which could be discussed at considerable length, and that is the examination of an expert witness, but it is impossible to go into the discussion, because it would require me to deal with the many details of it. All I can do is to say a few words of a general character with regard to it. From what I have observed and seen in regard to examinations by very eminent men, I have come to the conclusion that no counsel should ever cross-examine an expert witness unless he has as thorough a knowledge of the subject, in that particular branch of it, at least, as the expert himself. It is always safer to take practical results from experts than to examine them upon a scientific basis; and the expert man is the last man counsel should ask information from.

I have just a last word or two to add in regard to this subject, and that is counsel should always keep to the level of his witness; and I will illustrate that by a well-known story of Lord Jeffrey. The counsel, an academic man, was examining a poor Scotchman at the court in Edinburgh. It was a question of the mental capacity of the testator, and the information he desired to get from this witness was, how well he knew the deceased, and the lawyer put to the witness questions in various forms—"were you on terms of intimate relationship with the deceased?"—and the witness looked at him and said, "Eh?"; he repeated the same question, using big words, away over the level of his witness—who didn't understand the question at all. Lord Jeffrey finally became impatient and said, "Now let me ask the witness a question," and he turned to the witness and he said: "James, did you ken Sandy Thompson in his lifetime?" "Well, I did." "How well did you ken him?" "Ken him—why me and him sleepit in the same kirk for 40 years." Now there was a degree of intimacy that could not be gainsay'd, and developed because Lord Jeffrey came to the level of the witness. I believe that very often questions are asked witnesses that they do not understand, and if they do understand them the complex form or high sounding words may be a pretence that they don't, and it only gives them the advantage of getting, as I say, a certain time for reflection and a certain amount of consideration before answering.

In concluding I will add that a general division might be referred to, and that is what I might call a direct and indirect method of cross-examination. I shall only point that out because you can consider for yourselves exactly how it works. The direct examination deals with the aggregate; the indirect is of a psychological character and deals with the foundation of items which, brought together, form the aggregate without putting the question of aggregate. As an instance of direct cross-examination, that is coming to the aggregate at once, I can point to a very forcible, perhaps the most forcible example we ever had at the Canadian Bar—the late Mr. B. B. Osler. As to the indirect or

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psychological course of cross-examination, I can point to a man who was a past master in that—the late Mr. D'Alton McCarthy. You know their methods. You know the difference between them—one went direct taking the aggregate as a whole, and dealing with that with the witness; the other laid his plans and drove his stakes as he went along, caring nothing whether in the aggregate the witness admitted the contention or not. The counsel had got the individual circumstances from which the court and the jury would draw the aggregate conclusion.

A writer named Cox, fifty years ago, put the case of cross-examination perhaps as well as any man could put it, and he says: "In considering these remarks on cross-examination, the rarest, the most useful and the most difficult to be acquired of the accomplishments of the advocate, we would again urge upon your attention the importance of calm discretion. In addressing the jury you may sometimes talk without having anything to say, and no harm will come of it. But in cross-examination every question that does not advance your cause, injures it. If you have not a definite object to attain, dismiss the witness without a word. There are no harmless questions here; the most apparently unimportant may bring destruction or victory. If the summit of the orator's art has been rightly defined to consist of knowing when to sit down, that of an advocate may be described as knowing when to keep his seat. Very little experience in our courts will teach you this lesson, for every day will shew to your observant eye instances of self-destruction brought about by imprudent cross-examination. Fear not that your discreet reserve may be mistaken for carelessness or want of self-reliance. The true motive will soon be seen and approved. Your critics are lawyers, who know well the value of discretion in an advocate, and how indiscretion in cross-examination cannot be compensated by any amount of ability in other duties. The attorneys are sure to discover the prudence that governs your tongue. Even if the wisdom of your abstinence be not apparent at the moment, it will be recognized in the result. Your fame may be of slower growth than that of the talker, but it will be larger and more enduring.

Now let me add one or two words of my own. Remember that cross-examination is a duty we owe to our clients, not a matter of mere personal glory or fame. Remember that regard must be had for the true administration of justice, and that justice must not be defeated by improper cross-examination. Remember that we owe an obligation to the State which gives a monopoly to our profession, and that we should render that to the State which inures to the benefit of the public. Remember also that in cross-examination we owe a duty to ourselves, and that we are bound to give the best that is in us in that most difficult art, however we may fail in the result; and so, if we fulfil all these obligations our names will be re-called as those who lent honour and dignity to our profession; we will be remembered as those who regarded fairness as one of the great elements of advocacy, and whose talents and genius were not aimed at self-glorification, but were used to establish truth, to detect falsehood, to uphold right and justice, and expose the wrongdoings of dishonest men.

**REVIEW OF CURRENT ENGLISH CASES.**

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**JUDGMENT CREDITOR—ISSUE OF EXECUTION AFTER DEBT PAID—  
SEIZURE—ABSENCE OF MALICE—TRESPASS.**

*Clissold v. Cratchley* (1910) 1 K.B. 374. In this case the defendant had recovered a judgment against the plaintiff. The defendant's solicitor had an office in the country and also in London. A f. fa. was issued by him from his London office in ignorance that the debt had been paid at his country office on the same day but shortly before the issue of the f. fa. The writ endorsed to levy the amount of debt and costs was delivered to the sheriff and a seizure made when the solicitor was informed that the debt had been paid, and at once withdrew the writ. The defendant (the plaintiff in the present action) then brought this action against the solicitor and his client to recover damages for improperly levying execution after the judgment had been satisfied, or in the alternative for trespass. It was found that neither the solicitor or his client had acted maliciously. The County Court judge who tried the action held that the defendants were liable and gave judgment against them for £15; but the Divisional Court (Darling and Phillimore, JJ.), came to the conclusion that in the absence of malice the defendants were not liable, and dismissed the action.

**MASTER AND SERVANT—RIGHT TO TERMINATE EMPLOYMENT—  
NOTICE.**

*Re African Association and Allen* (1910) 1 K.B. 396. This was a special case stated by arbitrators. By an agreement between the African Association and Allen made in May, 1907, the latter was employed by the association as their clerk or trade assistant in Africa, for two years, at a salary of £250 a year; provided that the association might at any time, at their absolute discretion, terminate the agreement at an earlier date if they desired to do so. Allen proceeded to Africa and entered on the employment and continued therein until September, 1907, when, without any previous notice, the association terminated the agreement, and the sole point stated for the opinion of the court was whether they could thus terminate the agreement without any prior notice; and the Divisional Court (Lord Alverstone, C.J.,

and Bucknill and Bray, JJ.) were unanimously of the opinion that although the association had a discretionary right of dismissal, it did not enable them to dismiss without first giving a reasonable notice which was an implied term of their exercising the right.

**TRUSTEE IN BANKRUPTCY—FIDELITY BOND—SURETY—LIABILITY FOR DEFAULT OF PRINCIPAL—FORFEITURE OF REMUNERATION BY TRUSTEE—SET-OFF:**

*The Board of Trade v. The Employer's Liability Assurance Corporation* (1910) 1 K.B. 401. In this case a point of some interest on the law of principal and surety is involved. The facts were that a trustee and his surety (the defendant corporation) had entered into a bond for the due performance of his duties by the trustee in a penal sum of £500 (subsequently reduced to £100), whereby the surety in case of default by the principal was bound to make good any loss or damage occasioned by such default. The principal improperly retained a sum of money in his hands for some years, and on it being discovered was removed from office, and his remuneration as trustee was forfeited, and he was charged with penal interest on the sum retained. The penal interest exceeded £100. The principal made good the sum retained, but did not pay the penal interest, which the plaintiffs claimed to recover to the extent of the penalty of the bond from the surety. The defendant claimed that the penal interest was not a loss or damage within the meaning of the bond, and also that the amount of the principal's remuneration should be set off against the penal interest; but Phillimore, J., held that the penal interest was a loss or damage within the bond, and that the defendant association was liable for the full amount of the penalty of £100; and the remuneration having been forfeited by the principal, it could not be set off in their surety's case as claimed.

**CHARTER-PARTY—LOADING TIME—EXCEPTIONS—"ANY OTHER CAUSE BEYOND CHARTERER'S CONTROL"—CONSTRUCTION—"EJUSDEM GENERIS"—DEMURRAGE.**

*Thorman v. Dowgate SS. Co.* (1910) 1 K.B. 410. This was an action by the charterer of a vessel against the owner, in which the plaintiff's claim was admitted; but the defendant's set up a counterclaim for demurrage. The ship was chartered to proceed to Alexandra Dock at Hull, and there load a cargo

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of coal in 120 hours. By the agreement of the parties there were excepted from the loading time, Sundays, holidays, strikes, frosts, or storms, any accidents stopping the working, loading or shipping of the cargo, restrictions or suspensions of labour, lock-outs, delay on the part of the railway company, either in supplying wagons or loading the coals, "or any other cause beyond the charterer's control." The ship arrived at Alexandra Dock, and notice was given of its readiness to load on 23rd July, but owing to the presence of other vessels which had previously arrived and were waiting to load, the turn of the ship to come under a loading tip was not reached until 1st August. The defendants claimed demurrage from 23rd July to 1st August. The plaintiffs contended that the delay was occasioned by a cause within the exception, "any other cause beyond the charterer's control"; but Hamilton, J., who tried the action, came to the conclusion that the delay in question was not of the same kind as any of the specified causes mentioned in the exception, and was, therefore, not within the exception, and that the plaintiff was consequently liable for the demurrage claimed.

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REPORTS AND NOTES OF CASES.

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**Dominion of Canada.**

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**SUPREME COURT.**

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**Ex. C.] LEGER v. THE KING.** [Mar. 11.

*Construction of statute—7 & 8 Edw. VII. c. 31, s. 2—Government railway—Fire from engine—Negligence—Damages.*

By 7 & 8 Edw. VII. c. 31, s. 2, the Government of Canada is liable for damage to property caused by a fire started by a locomotive working on a government railway whether its officers or servants are or are not negligent and by a proviso the amount of damages is limited if modern and efficient appliances have been used and the officers or servants "have not otherwise been guilty of any negligence."

*Held*, DAVIES, J., dissenting, that the expression "have not otherwise been guilty of any negligence" means negligence in any respect and not merely in the use of a locomotive equipped with modern and efficient appliances.

Sparks from a locomotive set fire to the roof of a government building near the railway track, and the fire was carried on to and destroyed private property. The roof of this building had on several previous occasions caught fire in a similar way, and the government officials though notified on many of such occasions had only patched it up without repairing it properly.

*Held*, reversing the judgment of the Exchequer Court (12 Ex. C.R. 389) that the government officials were guilty of negligence in having a building with a roof in such condition so near to the track, and the owner of the property destroyed was entitled to recover the total amount of his loss.

Appeal allowed with costs.

Teed, K.C., for appellant. Chrysler, K.C., for respondent.

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**Ry. Board.]** [Feb. 15.

**C.P. Ry. Co. v. CITY OF TORONTO.**

*Railways—Jurisdiction of Board of Railway Commissioners—Highway—Construction of statute—R.S.C. 1906, c. 37, ss. 2(2) — Deviation of tracks—Dedication — User — "Public way or means of communication"—Access to harbour—Navigable waters.*

Prior to 1888 the G.T. Ry. Co. operated a portion of its

railway upon the "Esplanade" in the city of Toronto, and in that year, the C.P. Ry. Co. obtained permission from the Dominion Government to fill in part of Toronto harbour lying south the "Esplanade," and the general public eased along the pro-which it did. Several city streets abutted on the north side of the "Esplanade," and the general public eased along the pro-longations of these streets, with vehicles and on foot, for the purpose of access to the harbour. In 1892 an agreement was entered into between the city and the two railway companies respecting the removal of the sites of terminal stations, the erection of over-head traffic bridges and the closing or devia-tion of some of these streets. This agreement was ratified by statutes of the Dominion and provincial legislatures, the Dominion Act providing that the works mentioned in the agreement should be works for the general advantage of Canada. To re-move doubts respecting the right of the C.P. Ry. Co. to the use of portions of the bed of the harbour on which they had laid their tracks across the prolongations of the streets men-tioned, a grant was made to that company by the Dominion Government of the "use for railway purposes" on and over the filled-in areas included within the lines formed by the pro-duction of the sides of the streets. At a later date the Dominion Government granted these areas to the city, in trust to be used as public highways, subject to an agreement respecting the rail-ways, known as the "Old Windmill Line" agreement, and accepting therefrom strips of land 66 feet in width between the southerly ends of the areas and the harbour, reserved as and for "an allowance for a public highway." In June, 1909, the Board of Railway Commissioners, on application by the city, made an order directing that the railway companies should ele-vate their tracks on and adjoining the "Esplanade" and con-struct a viaduct there.

*Held*, GIROUARD and DUFF, JJ., dissenting, that the Board had jurisdiction to make such order; that the street prolonga-tions mentioned were highways within the meaning of the Railway Act; that the Act of Parliament validating the agree-ment made in 1892, did not alter the character of the agreement as a private contract affecting only the parties thereto, and that the C.P. Ry. Co., having acquired only a limited right in the filled-in land, had not such a title thereto as would deprive the public of the right to pass over the same as a means of communica-tion between the streets and the harbour.

Appeal dismissed with costs.

*Armour, K.C., and MacMurchy, K.C., for appellants, C.P. Ry. Co. Blackstock, K.C., for appellants, G.T. Ry. Co. Dewart, K.C., and Chisholm, K.C., for respondents.*

**Ex. C.]                    CUNARD v. THE KING.** [Feb. 22.

*Expropriation of land—Water lots—Contingent value—Crown grant—Statutory authority.*

The Dominion Government expropriated, for purposes of the Intercolonial Railway, lands in Halifax, N.S., including a lot extending into the harbour. This lot could be made very valuable by the erection of wharves and piers for which, however, it would be necessary to obtain a license from the government of Canada as they would obstruct navigation. The title to the water lot was originally by grant from the Government of Nova Scotia, but no statutory authority for making such grant was produced. \$10,000 was offered by the government for all the lands and allowed by the Exchequer Court. The owners appealed, claiming a much larger amount.

*Held*, DUFF, J., dissenting, that under the circumstances the owners were not entitled to compensation on the basis of the water lot being utilized for wharves and piers, and if they were the amount tendered was sufficient.

*Held*, also, that a Crown grant of land cannot be made without statutory authority.

Judgment of the Exchequer Court (12 Ex. C.R. 414). affirmed.

Appeal dismissed with costs.

*Harris, K.C., for appellant. Newcombe, K.C., Deputy Minister of Justice, for respondent.*

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## Province of Nova Scotia.

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### SUPREME COURT.

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**The Full Court.]                    [April 2.**

*HIRTLE v. THE TOWN OF LUNENBURG.*

*Municipal corporation—Defect in sidewalk—Contractor—Municipality not liable for misfeasance of.*

A contractor who was employed by the Dominion Government to construct a concrete sidewalk around the post office in the

town of L. excavated the sidewalk preparatory to putting in the concrete, and as a temporary crossing for the public and the men employed in carrying on the work, laid down a piece of plank, one end of which rested on the curbstone and the other end on the ground near the entrance to the post office. The evidence shewed that the plank was defectively placed, and that it fell a number of times in consequence, and that it fell while plaintiff was crossing it, causing the injuries for which the action was brought. There was no evidence to shew that the town or the town authorities participated in the doing of the work, or that they were applied to for or gave a permit for the opening up of the sidewalk, although they had knowledge that the work was being done.

*Held*, that under the circumstances mentioned the town was not liable for any act of misfeasance on the part of the contractor or his principal.

*Maguire v. Liverpool* (1905) 1 K.B. 767 followed.

*Mellish*, K.C., and *Lane*, in support of appeal. *J. J. Ritchie*, K.C., and *Chesley*, K.C., contra.

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The Full Court.]

[April 2.

*FINKLESTEIN v. GLUBE.*

*Attorney and client—Settlement of case out of court by parties  
—Costs.*

Where the parties to an action, after the same has been set down for trial, without the knowledge of their respective solicitors, settled the action out of court, and there was an application by plaintiff's solicitor for leave to tax his costs, or, in the alternative, for leave to continue the action for the purpose of recovering costs against defendant.

*Held*, that the rule is clear that such an application can only be successful where there is good ground for holding that there was collusion between the parties for the purpose of cheating the solicitor out of his costs.

*O'Connor*, K.C., in support of appeal. *J. D. Davison*, contra.

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The Full Court.]

[April 2.

*THE CHAMBERS ELECTRIC, ETC., Co. v. THE PATILLO Co., LTD.*

*Electric light company — Recovery for current supplied —  
Schedule rates—Options.*

In an action by plaintiff company to recover for electric light

supplied to defendants' place of business (wholesale), plaintiffs' claim covered two periods of time during which light was supplied under different schedules. The charge for the first period included a charge per K.W. for the energy supplied and a "readiness to serve charge" of ten cents for each socket.

*Held* (following the *Chambers Electric Co. v. Cantwell*, 6 E.L.R. 529, for the reasons there given), that the charges were recoverable.

As to the second period plaintiffs' schedule included, among other subjects, "wholesale places, banks, offices, etc., using light up to 6 o'clock p.m., and a good deal in the evenings.

*Held*, that defendants' place of business was clearly embraced in this description.

Also, that it was not relevant that one or two other descriptions in the schedule, which had to do with other subjects, were not very definite.

The schedule contained, at the end of it, provisions for certain options to be given to customers to enable them to come in and make special agreements in lieu of the rates previously fixed.

*Held*, that this was valid in the absence of anything in the statute to prevent a customer from contracting himself out of the first provisions, and that such offers to customers did not in any way invalidate the fixed rates which were to prevail unless one of the options was accepted, and in the absence of anything in the evidence to shew that the rates under the optional provisions were higher than the fixed rates.

*Held*, also, that where under the schedule consumers were to be entitled to a discount of 10 per cent. "for payment of account within five days" defendant must shew that no account was rendered to be entitled to claim the discount as of right.

*Mellish*, K.C., in support of appeal. *S. D. McLellan*, contra.

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Russell, J.]

REX v. CROWLEY.

[April 4.

*Canada Temperance Act—Excessive costs—Habeas corpus.*

The defendant was convicted for selling intoxicating liquor contrary to Part. II. of the Canada Temperance Act by a stipendiary magistrate at Pictou, and was adjudged to pay a penalty of \$50 and \$13.45 costs, and in default of payment was imprisoned, etc. Included in these costs were items of 50 cents for "preliminary hearing" and 25 cents for "preliminary evidence" under Cr. Code s. 655 as amended by 8 & 9 Edw. VII.

c. 9(D.), and for \$1.40 for "28 fols. evidence at 5 cents" taken on the trial of the complaint. On motion for the prisoner's discharge on the return to a *habeas corpus*,

*Held*, that the justice exceeded his jurisdiction in taxing these items against the defendant, which were not only not allowed, but forbidden by s. 770 of the Cr. Code, and in awarding imprisonment until they, with the penalty, were paid, and that the defendant was entitled to be discharged from custody. *Ex parte Bourque*, 31 N.B.R. 509; *R. v. Elliott*, 12 O.R. 524; *R. v. Laird*, N.W.T. Reps. 105, and *Ex parte Myers*, 32 C.L.J. 371, referred to.

*Power*, K.C., for the prisoner. Nem. con.

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Lawrence, J.]

[April 8.

*REX v. BUBAR.*

*Canada Temperance Act—Costs of commitment—Habeas corpus.*

The defendant was convicted by two justices of the peace for the county of Pictou for a second offence against Part II. of the Canada Temperance Act, and was adjudged to forfeit and pay a penalty of \$100 and costs, and in default of payment distress, and in default of distress, imprisonment, etc., unless the said sums and costs of distress and of conveying to jail were sooner paid. On motion for a *habeas corpus*,

*Held*, that as the costs of conveying to jail are distinct from the costs of commitment, the conviction was bad (*Reg. v. Vantassel*, 34 N.S.R. 84), for not including the costs "of commitment" under s. 738(a) of the Code, and that the prisoner should be discharged. *Reg. v. Doherty*, 32 N.S.R., p. 238, per MEAGHER, J., referred to.

*Power*, K.C., for the motion. Nem. con.

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Laurence, J.]

[April 8.

*THE DOMINION COAL CO., LTD. v. BOUSFIELD ET AL.*

*Corporation—Striking employees—Interference with workmen  
—Remedy by injunction.*

A large number of workmen in the employ of the plaintiff company stopped work as a means of compelling the company to "recognize" a labour organization known as the "United Mine Workers of America," with which they were connected, and after going out "on strike" concertededly and systematically

interfered with the workmen who remained in the employ of the company by assaulting and otherwise molesting them, by following them on the streets in a disorderly manner, by "picketing" the places where the company carried on its business and the places where its workmen resided with the object of inducing the men who remained to leave the employ of the company and others from entering such employment.

*Held*, that plaintiff company was clearly entitled to be protected by injunction in such case pending the trial of the action.

*Mellish*, K.C., in support of application. *W. B. A. Ritchie*, K.C., contra.

Laurence, J.]

[April 8.

MCLEOD v. THE ST. PAUL FIRE & MARINE INS. CO.

*Marine insurance—Freight—Loss by perils insured against—Unreasonable delay in effecting repairs.*

Plaintiff insured against loss by perils of the sea the freight to be earned on a cargo of potatoes shipped on board a vessel of which he was owner and master from Prince Edward Island to New York.

While on her voyage the vessel was overtaken by a storm and put into a port in Nova Scotia in a damaged condition, and with her cargo wet with sea water.

The defendant company brought the vessel to Halifax, and after some delay discharged the cargo and repaired the vessel, and after selling a portion of the cargo re-shipped the balance and sent it forward to its destination.

*Held*, that the defendant company having dealt with the cargo in such a way as to prevent plaintiff from earning freight was liable for the loss so occasioned, and also for detention due to unreasonable delay in effecting repairs to the vessel.

*Bell*, K.C., and *Terrell*, for plaintiff. *W. B. A. Ritchie*, K.C., for defendant.

Laurence, J.]

A. v. B.

[April 8.

*Assessment and taxation—Exemptions—Educational institutions.*

The Halifax City Charter, s. 335, exempts from taxation buildings used as "a college, incorporated academy, school-house, or other seminary of learning."

*Held*, not to apply to a private school for the education of young people in certain branches of commercial education, con-

ducted wholly under the direction, management and control of the proprietors for their own benefit as their source of income.

*O'Connor, K.C.*, in support of appeal. *Bell, K.C.*, contra.

The Full Court.] [April 9.

THE SILLIKER CAR CO. v. DONAHUE.

*Company—Organization—Variation between prospectus and charter—Action for calls—Laches.*

The defence to an action to recover calls on stock subscribed for by defendant in the plaintiff company was that defendant agreed to take the shares in question subject to conditions set out in the prospectus, and that the powers taken by the company in the memorandum of association filed at the date of incorporation were wider than those proposed by the prospectus.

*Held*, assuming that wider powers were taken as alleged, that it was not open to defendant, after laying by for a period of upwards of two years to raise the objection, that he could not be heard on the point, and that he was properly held liable as a shareholder.

*O'Connor, K.C.*, in support of appeal. *Allison, contra.*

## Province of Manitoba.

### COURT OF APPEAL.

Full Court.] [March 7.

ROBERTSON v. NORTHWESTERN REGISTER CO.

*Promissory note—Presentment for payment—Waiver of—Liability of maker when note not presented at place where payable—Bills of Exchange Act, R.S.C. 1906, c. 119, s. 183—Holder in due course—Renewal note as acknowledgment of liability on original—Liability of company on note made by officer.*

Action by indorsees of promissory note given by defendant company to the payees for value. The plaintiffs took the note during its currency as security for an advance to the payees. The note was payable at the Bank of Hamilton, Winnipeg. At its maturity the secretary-treasurer of defendant company went to the office of the payees and gave them a renewal note without

inquiring for the original. The payees then negotiated the renewal note and the defendant company afterwards paid it.

The trial judge was satisfied upon the evidence that the original note had been presented for payment before action, but he nonsuited the plaintiffs on the ground that they, being shareholders in the payee company, were personally bound by the wrongful action of that company in taking the renewal note.

*Held*, per PERDUE and CAMERON, J.J.A.:—1. That the nonsuit was wrong, as there was nothing to shew that the plaintiffs were not holders in due course.

2. That the action of the defendants in giving the renewal note and subsequently paying it amounted to an acknowledgment that the original note was made with their authority, and that they were liable on it, and was also a waiver of presentment of it.

Per CAMERON, J.A.:—1. That, under s. 183 of the Bills of Exchange Act, presentment of the note for payment before action was not necessary, following *Merchants Bank v. Henderson*, 28 O.R. 360, and *Freeman v. Canadian Guardian Co.*, 17 O.L.R. 296, and dissenting from *Warner v. Symon-Kaye*, 27 N.S.R. 340, and *Jones v. England*, 5 W.L.R. 83.

2. That the defendants were liable on the note although it was not duly made under their by-laws as innocent holders of negotiable securities are not bound to inquire whether certain preliminaries which ought to have been gone through have actually been gone through.

*Imperial Bank v. Farmers' Trading Co.*, 13 M.R. 42, and *Re Land Credit Co.*, L.R. 4 Ch. 469, followed.

Per RICHARDS, J.A.:—That it was necessary to prove presentment before action, and this had not been done.

Per PERDUE, J.A.:—That there was sufficient evidence of presentment before action.

Appeal allowed and verdict entered for plaintiffs with costs.

C. S. Tupper, for plaintiffs. Symington, for defendants.

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Full Court.]

REX v. HOWELL.

[March 7.

*Criminal Code*, s. 778—Summary trial of indictable offence—Information to be given prisoner by magistrate when offering election as to mode of trial—New trial.

A police magistrate proceeding, under s. 778 of the Criminal Code, to offer a prisoner charged with an offence, for which he cannot be tried summarily without his consent, his choice as to

the mode of trial, should give the prisoner all the information set forth in paragraph (b) of sub-s. 2 of that section as re-enacted by 8 & 9 Edw. VII. c. 9; and, if he omits to inform the prisoner that he has the option "to remain in custody or under bail, as the court decides, to be tried in the ordinary way by the court having criminal jurisdiction," he does not acquire jurisdiction to try the prisoner summarily, although he consents thereto, and a conviction following will be quashed as made without jurisdiction.

*King v. Walsh*, 7 O.L.R. 149, followed.

Prisoner not discharged, but ordered to be brought again before the magistrate for the taking of proceedings *de novo*.

*Dennistoun*, K.C., for the Crown. *Howell*, for prisoner.

Full Court.]

[March 7.

*ISBISTER v. DOMINION FISH Co.*

*Negligence—Fire on vessel—Absence of precaution against spreading of fire—Dangerous conditions—Failure to warn passengers to escape.*

Appeal from judgment of METCALFE, J., noted, ante, p. 38, dismissed with costs, RICHARDS, J.A., dissenting.

*Hogel*, K.C., and *Blackwood*, for plaintiff. *Affleck*, and *Kemp*, for defendants.

#### KING'S BENCH.

Metcalfe, J.]

RE MOORE.

[February 23.

*Extradition—Extradition Act, R.S.C. (1906), c. 155, s. 16—Proof of foreign law—Affidavit evidence, use of—Grand larceny—Evidence of guilt, sufficiency of—Criminal Code, s. 686.*

1. Proof of the foreign law is not necessary to shew that "grand larceny" is included in the crime of larceny mentioned in the extradition treaty between the United States and Great Britain.

*In re Murphy*, 22 A.R. 386, followed.

2. When, at the close of the evidence for the demanding country, at the hearing of an application for extradition under the Extradition Act, R.S.C. (1906), c. 155, the judge calls on

counsel for the accused for his defence, a committal subsequently made will not be set aside on habeas corpus, on the ground that the judge did not formally ask the accused if he wished to call any witnesses, as required by s. 686 of the Criminal Code.

3. Notwithstanding the wording of s. 16 of the Extradition Act, affidavits sworn to in the foreign state may be received and acted on in extradition proceedings, following the practice adopted in *Counhaye Case*, L.R. 8 Q.B. 410, and in many Canadian cases.

4. When a charge of larceny is made in respect of a sum of money alleged to have been received by the accused from the prosecutor to be accounted for, and to have been fraudulently converted by the accused to his own use, sufficient *prima facie* evidence of the payment by cheque of the money to the accused is not given without the production of the cheque or the receipt given by the accused, in the absence of any deposition of an official of the bank in which the cheque was drawn.

*Reg. v. Burke*, 6 M.R. 121, and *Re Harsha* (No. 1), 10 Can. Cr. Cas. 433, followed.

The evidence contained in the affidavits being in this respect and otherwise insufficient to establish a *prima facie* case against the accused, he was held entitled to his discharge on habeas corpus.

*Phillips and Chandler*, for State of Washington. *Hagel*, K.C., and *Blackwood*, for prisoner.

Metcalf, J.]                    *ANDREW v. KILGOUR.*                    [March 7.

*Animal feræ nature—Raccoon—Liability of owner for damages done by.*

A raccoon is an animal *feræ naturæ* and a person who keeps one in a town is liable in damages for any injury inflicted by it on a neighbour upon escaping from captivity although the animal has been kept in the defendant's house for a long time, and was supposed to have been tamed.

*Hale's Pleas of the Crown*, vol. 1, p. 430, and *Filburn v. People's Palace, etc.*, L.R. 25 Q.B.D. 258, followed.

*McLeod*, for plaintiff. *Bowen*, for defendant.

Mathers, C.J.]                    *COPELIN v. CAIRNS.*                    [March 22.

*Practice—Security for costs—Application to set aside praecipe order for—King's Bench Act, rule 988.*

Rule 988 of the King's Bench Act, R.S.M. 1902, c. 40, does

not prevent a non-resident plaintiff, against whom an order for security for costs has been taken out on praecipe, from moving to set aside such order upon any ground otherwise open to him; it merely provides a means whereby such a plaintiff, wishing to move for summary judgment, may, by paying \$50 into court, proceed with such motion without fully complying with the praecipe order.

*Walters v. Duggan*, 17 P.R. 359, followed.

*Collison*, for plaintiff. *Burbridge*, for defendant.

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Mathers, C.J.]

[March 22.

*Haines v. Canada Railway Accident Co.*

*Accident insurance—Proviso against liability if deceased came to his death while under the influence of intoxicating liquor*—*Condition that notice of death must be given within ten days thereafter.*

When last seen alive, 21st November, 1908, the deceased was under the influence of intoxicating liquors and the probabilities were that he met his death by drowning on the same day, as nothing was seen or heard of him until his body was found in the river in the following spring, greatly decomposed, but without any mark of violence.

The policy sued on contained a provision upon which the defendants relied, namely, that, if deceased met his death while under the influence of intoxicating liquors, the claimant should only be entitled to one tenth of the amount of the policy.

*Held*, that the onus was upon the defendants, and that, as there was no evidence to shew exactly when the death took place, they had failed to make good that defence.

*Canadian v. American Accident Co.*, 25 S.W.R. 6, followed.

*Held*, however, that defendants were entitled to succeed on their objection that notice of the death had not been given to them by or on behalf of the insured within ten days after the death, as required by the policy, although no one knew of the death until months afterwards.

*Castle v. Lancashire, etc., Ins. Co.*, 1 T.L.R. 495, followed.

*Kentzler v. American Mutual*, 60 N.W.R. 1002, distinguished.

*Trueman*, for plaintiff. *Fullerton*, for defendants.

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Metcalfe, J.]

BURLEY v. KNAPPEN.

[March 28.

*Jurisdiction—Action against non-resident for cancellation of agreement of sale of land not in jurisdiction—Provision for cancelling agreement by mailing notice to purchaser “at post office.”*

In an action brought by a resident of the province as vendor against the purchaser, although he is a non-resident, for specific performance of an agreement executed within the jurisdiction for the purchase of land though out of the jurisdiction, under which the payments were to be made within the jurisdiction, the courts acts in personam and, if there is default in payment of subsequent instalments, has jurisdiction to order that the purchaser perform his contract within a time to be fixed, and that, in default, the contract be rescinded, and any money already paid thereon forfeited to the plaintiff.

*Piggott*, 127, 128, and *Grey v. M. & N.W. Ry. Co.*, 11 M.R. 48, followed. A provision for cancellation of an agreement of sale after default and forfeiture of money already paid by mailing a notice to the purchaser “at \_\_\_\_\_ post office” is ineffective and should be altogether disregarded.

*Cooper and Hogg*, for plaintiff. *McLaws*, for defendant.

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Metcalfe, J.]

[April 6.

PRAIRIE CITY OIL CO. v. STANDARD MUTUAL FIRE INSURANCE CO.

*Fire insurance policy—Condition requiring notice of loss to be given in writing forthwith.*

A provision of a fire insurance policy requiring the insured to give notice in writing of any loss to the company forthwith as a condition precedent to the liability of the company must be strictly complied with; and, if the insured fails to give such notice, he cannot recover on the policy even in a case where the company was advised of the loss on the same day by a telegram from its agent which was acknowledged by letter from the head office the next day, and the company's agent at once employed a professional adjuster to investigate the loss and report to the company.

*Bell Bros. v. Hudson's Bay Insurance Co.*, 2 Sask. L.R. 355, followed. The receipt by the company of a statutory declaration by the insured giving particulars of the loss, 17 days after the fire, was not a compliance with the condition requiring notice in writing “forthwith.”

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*The Queen v. Justices of Berkshire*, 4 Q.B.D., per COCKBURN, C.J., at p. 471, and *Atlas v. Bramwell*, 29 S.C.R., at p. 545, followed.

*Chapman and Green*, for plaintiffs. *Affleck and Kemp*, for defendants.

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## Bench and Bar.

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### JUDICIAL APPOINTMENTS.

The Honourable Désiré Girouard, a puisne judge of the Supreme Court of Canada, to be the Deputy of His Excellency the Governor-General, for the purpose of assenting, in His Majesty's name, to any bill or bills passed or to be passed during the present Session of Parliament. (March 15.)

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## United States Decisions.

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**NEGLIGENCE.**—*Crossing Accident*: If both plaintiff and defendant could have prevented the accident, but neglected to do so, their negligence was concurrent, and the last chance doctrine would not apply.—*Bruggeman v. Illinois Cent. R. Co.*, Iowa 123 N.W. 1007.

**PARENT AND CHILD.**—*Liability for Torts of Child*: Relationship alone does not make a parent answerable for the wrongful acts of his minor child; but it must appear that he approved such acts, or that the child was his servant or agent.—*Brittingham v. Stadiem*, N.C. 66 S.E. 128.

**PRINCIPAL AND AGENT.**—*Personal Injuries*: In general when a person acts avowedly as an agent for another who is known as the principal, his acts and contracts within the scope of his authority are considered the acts and contracts of the principal, and involve no personal liability.—*Roach v. Rutter*, Mont. 105 Pac. 555.

**RAILROADS.**—*Duty to Stop and Listen*: One having a right to cross a railroad track need not stop to look or listen before crossing, in order to discover whether a train is approaching.—*Chesapeake & O. Ry. Co. v. Patrick*, Ky. 122 S.W. 820.

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## *MERCIER v. CAMPBELL AND THE STATUTE OF FRAUDS.*

### INTRODUCTORY.

A decision of very much more than ordinary importance, and which yet has apparently attracted little, if any, special attention, was added to our store of Ontario cases when the Divisional Court of the King's Bench Division, on the 16th of January, 1907, handed out judgment in the case of *Mercier v. Campbell* (14 O.L.R. 639).

The case touches that prolific source of legal contention and difficulty, the Statute of Frauds. Perhaps, although on many questions arising under it the cases are admittedly in hopeless confusion and contradiction, no enactment has, in a more marked degree, or through a longer series of years commanded the general respect both of the judiciary and the profession, and possibly none has been more jealously guarded by the courts from attacks either open or covert. Thus in *Chater v. Beckett*, 7 T.R. 201, we find Lord Kenyon, C.J., expressing himself as follows: "I lament extremely that exceptions were ever introduced in construing the Statute of Frauds; it is a very beneficial statute, and if the courts had at first abided by the strict letter of the Act it would have prevented a multitude of suits that have since been brought."

So we find that the courts have always been alert to detect and frustrate anything that bore the semblance of an attempt to circumvent or evade the statute; while counsel have always considered it an unanswerable argument to say that if such and such a contention were allowed then the Statute of Frauds might as well be wiped off the statute book.

In *Lord Walpole v. Lord Oxford*, 3 Ves. 410, for instance (where the question at issue related to the validity of an alleged

agreement to make reciprocal wills), we find the Attorney-General (arguendo) expressing himself thus: "The Statute of Frauds is at an end if under the name of an agreement a thing may be made a devise or under the name of a devise an agreement, which is not either according to that statute"; compare also the language of Lord, J., in *Chase v. Fitz*, 132 Mass. 361, which decides that an agreement to comply with the statute is within its provisions, and no action can be maintained for its breach. "It would leave but little, if anything, of the Statute of Frauds to hold that a party might be mulcted in damages for refusing to execute in writing a verbal agreement which unless in writing is invalid under the Statute of Frauds." All of which goes to shew that the strong feeling both of Bench and Bar has always been that come what may the Statute of Frauds must be preserved inviolate.

Heretofore, moreover, whatever may have been the fate of other enactments too numerous to mention, no one has ever been able to boast that he has succeeded in driving the proverbial coach and horses through this statute.

#### EFFECT OF DECISION.

That being the light in which one has grown accustomed to regard this Act, it must be confessed that the effect of the decision now under discussion was calculated to be somewhat startling, as the judgment seems at first sight to convey the impression that the Statute of Frauds may henceforth be practically evaded in all cases by a very simple expedient.

The question at issue in this case is one which has very frequently formed the subject of judicial discussion, and whatever may be the rights and wrongs of the matter, the legal world has undoubtedly been laid under a deep obligation to his Lordship Mr. Justice Riddell by the very able and thorough manner in which he has analysed the law on this much discussed question in his valuable judgment in the case.

**FACTS OF THE CASE.**

The facts of the case are shortly, as follows:—The defendant, desiring to purchase the hotel of the plaintiff, an agreement was entered into under the hands and seals of the parties whereby it was agreed that the plaintiff should sell, and the defendant purchase the premises in question, and there was added the following clause: “And in case Mrs. Mercier refuses to carry out the sale of the property as aforesaid, she will have to pay to said Campbell the sum of \$300. And in case said Campbell refuses to carry out the part assigned to him in accepting the title to said property, he will have to pay Mrs. Mercier a like sum of \$300.”

Mr. Campbell declining to carry out the agreement to purchase the hotel, Mrs. Mercier sued for the \$300. It was admitted on all hands that the agreement for sale of the hotel was nugatory as being insufficient to satisfy the provisions of the Statute of Frauds, but the Divisional Court (Q.B.D.) held, reversing the judgment of His Honour Judge Constantineau, senior county judge of Prescott and Russell, that the agreement to pay the \$300 on default was nevertheless valid and enforceable.

**DISCUSSION.**

It will, no doubt, seem to many that this decision has the appearance of running counter to a number of cases, in which it has been held that agreements of this nature cannot be enforced, for the reason that to do so would be to sanction a palpable evasion of the statute.

We quote from Browne on the Statute of Frauds (5th edition), at page 163, “This case (*Carrington v. Roots*, 2 Mees. & W. 248) affords a very clear exemplification of the general rule, which may be here reasserted, that no action can be brought to charge the defendant in any way upon his verbal agreement not put in writing according to the statute. (*Finch v. Finch*, 10 Ohio St. 501; *Culligan v. Wingerter*, 57 Mo. 241; *Smith v. Tramel*, 68 Iowa 488). And it may be briefly illustrated further. If land be sold at auction or otherwise, and no memorandum made, and

the purchaser refuse to take it, no action will lie against him to recover the loss sustained upon a second sale to another party; this could be done, manifestly only upon the ground that he was originally legally liable to take and pay for the land himself. (*Baker v. Jameson*, 2 J.J. Marsh (Ky.) 547; *Carmack v. Masterson*, 3 Stew. & P. (Ala.) 411. But, perhaps, if there were circumstances of deceit in the case, the plaintiff might recover in an action on the case for the deceit. See *Kidder v. Hunt*, 1 Pick. (Mass.) 328. Nor will a discharge from performing a verbal contract within the statute be a sufficient consideration to support another engagement. No action whatever could have been maintained against the defendant for any breach of that contract. A discharge from it, therefore, is of no use to him. *North v. Forest*, 15 Conn. 400; *Shuder v. Newby*, 85 Tenn. 348. But see *Stout v. Ennie*, 28 Kansas 503.) So, an engagement to forfeit a certain sum of money in case of failing to perform another engagement which, within the Statute of Frauds, could not itself be enforced, cannot be enforced by the party to whom it is made. (*Goodrich v. Nichols*, 2 Root (Conn.) 498; *Rice v. Peet*, 15 Johns (N.Y.) 503. But see *Couch v. Meeker*, 2 Conn. 308.)<sup>1</sup> Also paragraph 152 at page 187 as follows:—

“A class of contracts to which allusion has been heretofore made, namely, those in which a party promises to do one of two or more things, the statute applying to one of the alternative engagements, but not to the others, is sometimes referred to the head of contracts in part affected by the statute. It is needless to dwell upon the question whether they are properly so referred. It is manifest that of such alternative engagements no action will lie upon that one which, if it stood alone, could be enforced as being clear of the Statute of Frauds, because the effect would be to enforce the other; namely, by making the violation of it the ground of an action. (*Van Allstine v. Wimble*,

1. In *Couch v. Meeker* A. gave his note to B. upon condition that “A. having this day bargained his . . . farm to B. Now if A. stands to the bargain, the note is to be void; if not it is to stand in full force.” The jury found for the plaintiff, and this verdict was allowed to stand, though admittedly the contract for the sale of the land could not have been enforced.

5 Cowen (N.Y.) 162; *Patterson v. Cunningham*, 12 Me. 506; *Goodrich v. Nichols*, 2 Root (Conn.) 489; *Rice v. Peet*, 15 Johns (N.Y.) 503; *Howard v. Brower*, 37 Ohio St. 402. But see *Couch v. Meeker*, 2 Conn. 302.)”

The law is similarly stated by other text-writers; for instance, Sutherland on Damages, 3rd ed., page 711, s. 280, expresses it as follows:—“Damages can be liquidated only on a valid contract. A valid contract must exist on which damages could be recovered. If void for not being in writing (*Newman v. Perrill*, 73 Ind. 153; *Scott v. Bush*, 26 Mich. 418-12 Am. Rep. 311), or if impeached for fraud, the stipulation for damages will share the same fate as the contract.”

It will be observed that the point decided by the line of cases headed by *Goodrich v. Nichols* (sup.), is the precise point dealt with in the present case.

#### IMPORTANCE OF DECISION.

On this point the case under discussion is a practical reversal of the line of cases referred to, in that respect agreeing with the case of *Couch v. Meeker*, above mentioned. Indeed Mr. Justice Riddell in his judgment, expressly impugns the statement of the law as above set forth in the extract from Browne on the Statute of Frauds, and in the line of cases cited.

It is largely for this reason that the judgment seems to us to possess such special significance.

Whether the present case will mark the parting of the ways as between the law of Ontario, and that of England and the United States on the point in question, it may be as yet too early to say. Two things, however, seem fairly assured: First, that the case has effected a change in the law of Ontario on the point in question and, secondly, that the decision seems to countenance doctrine which is much at variance with what has heretofore been generally considered to be the law upon the subject in England and the United States.

Heretofore we believe the extract from Browne above quoted has been taken to be a correct exposition of the generally accepted law on the subject in both the last mentioned countries.

To Mr. Campbell, the defendant, the general result must have seemed not a little confusing. When the case was finally disposed of he would be told that the law had condemned him to pay \$300 and costs for declining to do what the law at the same time said he was not bound to do. To a layman this would doubtless seem puzzling enough, but it is not the layman alone who will find matter of perplexity in the case. Many aspects of the case present themselves which may well give the lawyer serious food for cogitation. For instance, it might be thought that the agreement by either party to pay the other \$300 in case of refusal to carry out the agreement was neither more nor less than an agreement liquidating the damages for breach of the main agreement<sup>2</sup>.

And, if so, must the plaintiff not first prove that there is a valid main agreement for breach of which she is entitled to some damages, before having recourse to the subsidiary question as to what amount those damages shall be assessed at? But the statute would obviously step in to prevent the first step, inasmuch as, by reason of its provisions, there was no valid main agreement for breach of which any damages at all could be recovered.

On this branch of the question we quote from the judgment of the learned County Court judge whose judgment is appealed from, which, although unfortunately unreported, we have been privileged to puruse, and which contains an admirable discussion of the points arising under the Statute of Frauds, and a very full collection of the authorities:—

2. In his judgment in *Knapp v. Carley*, 3 O.W.R. 940, at page 942, the learned Chief Justice of the Common Pleas Division, speaks as follows:—  
“The appellant is, I think, right in his contention that the damages are liquidated. The words of the agreement are, ‘we, the said parties hereto, agree to forfeit each to the other the sum of \$200 in case either fails to comply with the conditions of the above agreement.’

“The word ‘forfeit’ is perhaps more consistent with the idea of a penalty than a sum payable as liquidated damages, and the latter term is not used. That is not, however, conclusive either way. The question is one of law, to be decided upon a consideration of the whole instrument, and the principle upon which it is to be decided is simply to ascertain the real intention of the parties. Having regard to the moderate sum named, and the fact, as I take it to be, that the loss which would accrue to the other party from a failure of one of them to perform the agreement on his part, cannot be accurately or reasonably calculated in money antecedently to the breach, I think that the sum which the parties have named should be ‘treated as liquidated.’”

"Finally, it was insisted by the plaintiff's counsel that, even if the memorandum does not satisfy the requirements of the Statute of Frauds, yet that the plaintiff may recover on the promise of the defendant to pay \$300 in case of breach of the contract by him. This is an attempt to introduce a most startling principle. It amounts to this; that any contract within the Statute of Frauds, however informal it may be, may be the foundation of an action at law for damages, provided the parties have beforehand fixed and agreed upon what sum shall be recoverable in case of breach thereof. To admit the application of such doctrine, would be, to use the language of a learned judge, in effect to "permit parties to agree that the Statute of Frauds shall not affect their contracts." Gantt, J., *Ringer v. Holtzclaw* (1892), 20 S.W. 800. Indeed, whether the damages are assessed by a jury or the amount thereof is fixed by the parties, they must always be for the breach of a valid contract. A stipulation in a contract as to liquidated damages, cannot alter the nature of such damages nor indirectly validate a void agreement. Such stipulation must stand or fall with the contract itself. Supposing that the agreement contained a proviso that in case of breach thereof by one of the parties the other shall be entitled to recover damages, surely it could not be contended that such proviso would be of any help to the party suing. But does it alter the nature of such proviso by mentioning the amount that would be recoverable? Supposing also, that I were to hold that the \$300 were in the nature of a penalty, could I proceed to assess the damages if I thought the agreement invalid under the Statute of Frauds? I think clearly not. But by holding that the \$300 are liquidated damages, do I alter my position or the position of the parties, assuming always that the contract is invalid? In an action for breach of contract it is obvious that the plaintiff must prove the existence of a legal contract, the breach thereof, and the damages which he has suffered. Where, however, the amount of the damages is fixed beforehand by the parties, the last proof is dispensed with, but this is the only essential difference there is between a contract containing a stipulation for liquidated damages and one silent as to damages.

The application of a different principle by permitting recovery of the amount mentioned in the stipulation, notwithstanding the invalidity of the agreement in law, would be to allow a party in one breath to admit its illegality and in another to maintain its validity.

Not only such doctrine, I apprehend, cannot be upheld upon principle, but so far as I know, it has never received the sanction of any authority. Indeed, quite an extensive search made by me through the English and American reports has failed to reveal a single case affording support thereto.

Browne on Statute of Frauds, s. 122, says: "As a general proposition, however, we shall hereafter see that a verbal contract within the statute cannot be enforced in any way, directly or indirectly, whether by action or in defence."

In *Dung v. Parker* (1873) 52 N.Y. 494 it is held "that a contract void by the Statute of Frauds cannot be enforced, directly or indirectly. It confers no right, and creates no obligation between the parties to it, and no claim can be founded upon it as against third persons. Whatever may be the form of an action at law, if the proof of such a contract is essential to maintain it, there can be no recovery."

This identical language is adopted by Mr. Justice Woods, delivering the judgment of the Supreme Court of the United States in *Dumphy v. Ryan* (1885), 116 U.S. 496. And at page 27, "In order to establish his cause of action, he must put before the court an invalid agreement and prove a breach thereof, and then ask the court for the indirect enforcement of such a contract by giving effect to the stipulation for liquidated damages. This, we repeat, is against principle and authority. I think I can safely say, that no case can be found where a plaintiff has been allowed to succeed in a court of law, where in order to do so, he was obliged to prove and base his claim upon an invalid contract under the statute." To use the language of Eyre, C.J., in *Walker v. Constable* (1798), 2 Esp. 659, 1 B. & P. 306, I may say: "The plaintiff cannot proceed without production of the contract. The defendant's objection is a strictly legal one; the foundation of the action is the contract for the sale of the prem-

ises; which contract, in order to be valid, the Statute of Frauds requires that it should be in writing." See argument of Macaulay in *McCollum v. Jones* (1827), Tay. (U.C.) 443.

On the whole, my conclusion is that if the contract sued upon in this action is invalid, as I hold it is, it cannot be enforced either directly or indirectly, in violation of the plain words of the Statute of Frauds, which says that no action shall be brought on such contract. The stipulation as to damages is not divisible from the rest of the agreement; it is one entire contract, and if one part falls, the whole must fall."

#### REASONS FOR JUDGMENT OF DIVISIONAL COURT.

The considerations which seem mainly to have weighed with Mr. Justice Riddell in deciding this case are as follows:—

1. The view that the citation from Browne on the Statute of Frauds, s. 152: ("A class of contracts . . . namely, those in which a party promises to do one of two or more things, the statute applying to one of the alternative engagements, but not to the others, is sometimes referred to the head of contracts in part affected by the statute . . . It is manifest that of such alternative engagements, no action will lie upon that one which, if it stood alone, could be enforced as being clear of the Statute of Frauds, because the effect would be to enforce the other; namely by making the violation of it the ground of action"), is an erroneous statement of the law, and that the cases on which it rests<sup>3</sup> are unworthy of credit, as being either erroneously decided or failing to support the proposition for which they are cited.
2. The view that the contract in this case is not entire, but severable.

3. See *Goodrich v. Nichols* (1797) 2 Root (Conn.) 489; *Van Alstine v. Wimble* (1825) 5 Cowper (N.Y.) 162; *Rice v. Peet* (1818) 15 Johns N.Y. 503; *Patterson v. Cunningham* (1825) 12 Me. 506; *Newman v. Perrill*, 73 Ind. 153; *Scott v. Bush* (1873) 26 Mich. 418; *Weatherley v. Choate*, 27 Tex. 272; *Kraak v. Fries*, 21 Sup. Ct. D.C. 100; *Levy v. Bush* (1871) 45 N.Y. 589; *Hocland v. Blake* (1878) 97 U.S. 624; *Mather v. Scholes*, 35 Ind. 1; *Lord Lexington, Clark* 2 Ventr. 223; *Chater v. Beckett*, 7 T.R. 201, etc.

### DISCUSSION.

It is, of course, well-recognized law that a contract may be good in part, and bad in part; and if you can separate the good part from the bad, the good part may be enforced, *Wood v. Benson* (1831), 99; *Mann v. Nunn* (1874), 43 L.J.C.P. 241.

The judgment under consideration puts the matter as follows, page 650: "It seems to me clear that the promise of the defendant to pay the sum of \$300 if he should not carry out his agreement is distinct from the agreement to purchase; it is an alternative." The judgment therefore assigns the present case to the same category as that occupied by such cases as *Mayfield v. Wadsley* (1824), 3 B. & C. 357; *Kerrison v. Cole* (1807), 8 East 231; *Green v. Saddington* (1857), 7 E. & B. 503; *Jeakes v. White* (1851), 6 M. 873; *Morgan v. Griffiths* (1871), L.R. 6 Ex. 70; *Boston v. Boston* (1904), 1 K.B. 124.

Of these cases that of *Jeakes v. White* (of which the judgment under comment says, "the case nearest the present that I have found is *Jeakes v. White*"), may be taken as typical. The facts in *Jeakes v. White* were that there was a verbal agreement that the plaintiff should lend the defendant £2,000 on a mortgage of land, and the defendant agreed to pay the plaintiff any expense he might incur in case the loan should fall through by reason of the defendant withdrawing or of his title proving insufficient. The defendant failed to make out a good title. The plaintiff sued for the expenses incurred and succeeded, it being held that the agreement was not within the Statute of Frauds. It may perhaps be thought that the circumstances in this case are not very closely analogous to those in the case under discussion. It seemed clear that the contract there sued on could not be said in any sense to be within the Statute of Frauds, and there would seem to be no good reason why the action should not be permissible. The matter was referred to during the course of the argument as follows: "Alderson, B., 'Then the contract merely relates to the investigation of a title, the parties agreeing that in case the title should turn out to be defective, the defendant should pay all the costs of the investigation. The con-

tract does not relate to any interest in land, and is not within the statute.' Pollock, C.B., 'We all think that is the true construction of this agreement.' " Upon this point the following cases and text-writers were cited; *Cocking v. Ward*, 1 C.B. 858; *Inman v. Stamp*, 1 Stark 12; 1 Addison on Contracts 36; Dart on Vendors and Purchasers, 92, 104; *Vaughan v. Hancock*, 3 C.B. 766; *McIver v. Richardson*, 1 M. & Sele. 557, and *Carrington v. Roots*, 2 M. & W. 248.

In *Green v. Saddington* (sup.), another of the cases in this category, the plaintiff and defendant agreed verbally that the plaintiff should pay the defendant £37 for the interest of the defendant in certain premises, and that the defendant should return £10 if the plaintiff were refused a license to use the premises as a slaughter house. The £37 was paid, and the license refused. The plaintiff thereupon sued for the £10 and was held entitled to recover, on the ground that the contract was not entire, but that there was a separate promise to pay, and that it was not within the Statute of Frauds.

It will be observed that there is a very significant point of distinction between the line of cases falling within this category and the case under discussion, in that in the former that part of the contract which would fall within the Statute of Frauds had been executed.

In the case last cited (*Green v. Saddington*), Erle, J., expresses himself as follows, page 597: "The defendant objects that the whole contract was for a contract or sale of an interest concerning land, and void for the want of writing; and the objection would prevail if the action was for the land or purchase money, according to *Cocking v. Ward*, 1 Con. B. 858 (E.C.L.R. vol. 50). But the interest in land in this case has passed; and the purchase money has been paid. As far as the land is concerned the contract is completely executed and cannot now be rescinded. In the present action the whole consideration for the promise now sued on was money, viz., £37. The whole of the promise now sued on is for money, viz., £10. It, therefore, appears to us not to be within the Statute of Frauds; but on the

contrary to be within the class of cases where, after the contract directly concerning an interest in land has been executed, the action has been held to be upon a separate promise to be performed after such execution." *Griffith v. Young*, 12 East 513; *Poulter v. Killingbeck*, 1 Bos. P. 397; *Seaman v. Price*, 2 Bing. 437 (E.C.L.R. vol. 9); *Souch v. Strawbridge*, 2 Com. B. 808 (E.C.L.R. vol. 52), also referred to.

Then a word as to whether a contract of this kind is in fact entire or severable.

It is well-settled law that if the agreement is entire, and parts of it are bad by reason of the Statute of Frauds, the whole is bad, and no action can be maintained upon it. *Thomas v. Williams*, 10 B. & C. 664; *Mechelen v. Wallace*, 7 Ad. & E. 49; *Vaughan v. Hancock*, 3 C.B. 766; *Prante v. Schutte*, 18 Ill. App. 62; *Coyler v. Roe*, 99 Ind. 1; *Ranboll v. East*, 56 Ind. 538, etc., etc.

And on the other hand that if the agreement is severable the good part may be enforced.

The latter case is generally illustrated by cases where there is an agreement to pay for past services and to pay for others to be furnished in the future, another person being also liable for the past debt. A promise for instance to pay for gas that has been furnished a third person, and for all gas to be furnished, is severable, and an action may be maintained on the promise not obnoxious to the statute. *Wood v. Benson*, 2 Crompt. & J. 94; *Mayfield v. Wadsley*, 3 B. & C. 357. Similarly in the case of an agreement to pay for board already furnished a child and for board to be furnished. *Haynes v. Nice*, 100 Mass. 327. See also *Mobile Insce. Co. v. McMillan*, 31 Ala. 711; *Pierce v. Woodward*, 6 Pick. (Mass.) 206.

Some may be inclined to think that between cases of the character of those last mentioned where the agreement was held to be severable, and the present case there is a very marked distinction.

It may be thought by many that the agreement in the present case to pay the \$300, is so bound up with the contract to purchase the land that it is impossible to sever them, and that in

fact to do so would be practically to allow an action in the teeth of the statute—in fact that the present case falls within the statement of the law which is found expressed in the following terms in the American and English Encyclopædia of Law, 1st ed., vol. 8, page 662n, 6: “When the agreement is so far entire that to allow recovery would be virtually to repeal the statute, no such action can be maintained. A series of English cases illustrate this.”

Reference is there made to *Cockins v. Ward*, 1 C.B. 858; *Kelly v. Webster*, 12 C.B. 283; *Smart v. Harding*, 15 C.B. 652, etc.

3. The impression that the line of American cases above referred to as supporting the defendant’s contention herein (*Goodrich v. Nichols* (1797), 2 Root (Conn.) 498, Sup. et al.), is based on what the judgment describes as “the supposed principle that in the case of alternative promises, if one cannot be enforced, the other cannot be enforced.” As to this principle the judgment goes on to say, “I find absolutely no trace of any such doctrine in the cases in England or in Ontario. I have examined text-book after text-book and find no suggestion of such a principle. The contrary is, I think, laid down in *Stevens v. Webb* (1835), 7 C. & P. 60, in which the court holds that if an agreement is in the alternative, and one branch of the alternative cannot by law be performed, the party is bound to perform the other.

In that case the agreement was “In consideration of the discharge of the defendant I hereby undertake to pay £35 on Wednesday next, or in default thereof to surrender him to the sheriff in this action. The defendant tendered himself to the sheriff, who could not retake him without being liable to an action. It was held that the £35 must be paid.” *Da Costa v. Davis* (1798) 1 B. & P. 242; and *Wharton v. King* (1831) 2 B. & Ad. 528, are also cited to the same effect.

Stated in the manner above mentioned it would seem clear that the supposed proposition of law could not be supported for a moment, but that the direct contrary is, as pointed out by the judgment, the well-established law. The point is dealt with by such well-known text-writers as Leake & Chitty, as follows:—

"If a person promises to do one of two things in the alternative, and at the time of making the contract one of them is impossible, as a general rule he must perform that which is possible." Leake on Contracts, 4th ed., page 501, and again, "When a contract is in the alternative . . . if one branch of the alternative cannot be performed the promisor is bound to perform the other." Chitty on Contracts 15th ed., pages 700 to 701.

But is there not room for question whether the cases referred to (*Goodrich v. Nichols*, Sup. et al.), are in fact founded on the supposed doctrine as above stated? Is it not a somewhat different doctrine that forms their basis? A doctrine to the effect that in case of alternative promises, if one cannot be enforced *by reason of the Statute of Frauds*, the other cannot be enforced. That would seem to be an entirely different proposition, and one which seems to be supported by a very respectable line of authority; for instance, we find it stated in the English and American Encyclopædia of Law, 1st ed., vol. 8, page 633, as follows:—"Where an agreement is in the alternative, if one alternative is bad by the statute, no action can be maintained on the agreement, although the other is good. Thus an oral agreement by sons with their father to convey certain land to a sister, or, in default of conveyance, to pay her a certain sum of money is wholly bad. *Patterson v. Cunningham*, 12 Me. 506." In addition to the cases above cited in support of this doctrine (*Goodrich v. Nichols*, *Rice v. Pett*, etc.), see also *Howard v. Brown*, 37 Ohio 402; *Van Allstine v. Wimble*, 5 Cow (N.Y.) 162.

The reason for this doctrine would seem to be that to allow the enforcement of the apparently unobjectionable alternative would be in effect to allow enforcement of the alternative within the statute, and especially would this be the case when the former alternative was merely the payment of a sum of money conditioned on the breach of the latter alternative.

It will be seen that the distinction between the two doctrines is marked. In the case of an alternative agreement which is simply unenforceable, as in the case of the undertaking to re-deliver a person to the sheriff above referred to, there is noth-

ing to prevent the other alternative being enforced, but in the case of the alternative, unenforceable by reason of the Statute of Frauds, there is the distinct provision of the statute that no action shall be brought on such an agreement, and the practically uniform trend of the decisions on the subject seems to be that that means no action in any shape or form, either directly or indirectly. (See authorities above cited, and also *Dung v. Parker* (1873) 52 N.Y. 494; *Dumphy v. Ryan* (1885) 116 U.S. 496). In *Carrington v. Roots* (1837) 2 M. & W. 248, Lord Abinger, said. "But wherever an action is brought on the assumption that the contract is good in law, that seems to me to be in effect an action on the contract." *McCollum v. Jones* (1827) Tay. (U.C.) 442.

Were there a similar statute, providing that no action should be brought on agreements such as that in *Stevens v. Webb* (Sup.) (to surrender a person to the sheriff) it might perhaps be that an alternative agreement in such a case would, *pari ratione*, be held nugatory also. It is worthy of attention also that in the present case the contract is not exactly in the form of an even alternative, but is a contract to purchase the realty (which is plainly the main object of the contract) with a provision added, "and in case Campbell refuses to carry out the part assigned to him in accepting the title to said property, he will have to pay Mrs. Mercier a like sum of \$300."

The net result of the matter seems to be that there are undoubtedly contradictory currents of authority on the subject.

On the one side there is the array of cases above mentioned, a no inconsiderable one, and the statements of numerous text-writers founded thereon, while on the other the main authorities seem to be *Couch v. Meeker*, 2 Conn. 308 (Sup.), and the case under discussion, while some countenance is undoubtedly lent to the same doctrine by the case of *Knapp v. Carley*, 3 O.W.R. 940. The case under discussion is referred to in *Kinzie v. Harper*, 15 O.L.R. 582, which however is on a different point.

The point involved is undoubtedly one of great practical importance; it has already, as above indicated, been the subject

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of much judicial discussion, in which diverse views have been expressed, and no doubt in the future it will again be the subject of similar discussion.

F. P. BETTS.

London, Ont.

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#### *THE ONTARIO BAR ASSOCIATION.\**

The most important event, so far as this Association is concerned, in the past year has been the widening of the basis upon which the Association rests, so that now the president or elected representative of each County Law Association has become a member of our council. This completes the organization which the Association has always had in view and makes it, in fact, as well as in name, a body representative of the profession throughout Ontario.

Another matter to which reference must be made is the hearty co-operation of our sister society, the Toronto Bar Association, in the work done in connection with the so-called Law Reform Act of last year. I wish to express personally, and on behalf of this Association, my thanks for the cordial way in which the members of the Toronto Bar Association worked with us in endeavouring to impress on the Government the inadvisability of interfering with the constitution of the Court of Appeal. Our united efforts were successful to the extent of postponing the operation of the Act which was finally passed. No good reason is yet apparent for the remodelling of our appellate practice. It was also demonstrated that the percentage of double appeals in this province was, in comparison with the number of cases tried, trifling, and except in cases of compensation for personal injuries did not need a legislative cure. The profession seemed fairly well united in the opinion that while in those cases a remedy might and ought to be found, the remedy proposed was inappropriate.

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\*Address of the president. Mr. Frank E. Hodgins, K.C., delivered at the annual meeting at Osgoode Hall, April 8th.

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But I mention this subject chiefly to say that the relations created in this way between the two Associations is of itself sufficiently important to call for notice. There is indeed great need for a closer drawing together of the members of the Bar, both for the sake of the common interests of our strenuous life, but also so that we may not entirely lose what is the greatest charm connected with practice of the law, the intimate companionship of congenial minds and the enjoyment of the lighter and more social side of our incomparable though jealous profession. The work of that profession is, owing to the development of Canada, becoming more absorbing and exacting every day, and there is a very great danger to ourselves if we do not cultivate those qualities which relieve the tedium of work and help us to become a more effective element among our fellows. Otherwise we run the risk of degenerating into mere machines, unattracted by, and out of touch with, the numerous interests and movements which it is our privilege to safeguard and sometimes even to illuminate. Acting upon this feeling, which ought not to be a purely local one, this Association sent some of its members to represent it at various gatherings of the Bar, namely, at the meeting of the American Bar Association at Detroit, in August; at the New York State Bar Association meeting at Rochester, in November; and at the Montreal Bar Association banquet, in December. The representatives selected were Mr. Charles Elliott, Mr. H. M. Mowat, K.C., and Col. W. N. Ponton, K.C. I need hardly say that they were received with great hospitality, and one reason why we expect to have such a distinguished representative from the New York State Bar Association present with us to-night, is because in the words of the secretary, "Mr. Justice Riddell and Mr. Mowat made such a good impression upon the members of the New York Bar that they feel they could do not less than send us their best." Mr. Elliott, as a lawyer with literary leanings, was greatly appreciated, and Col. Ponton's speech to the Montreal Bar Association in French was much enjoyed. He was selected not only on account of his qualifications, but because Belleville has, I think, set an example to the rest of the Bar in its hospitality to the members of the Bench

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and Bar going circuit in that city. For some years past they have given a dinner to the visiting judge, and have in every way endeavoured to make the event a very pleasant one for outside counsel.

It may be well here to remind you that a suggestion has recently been made looking to the preservation of the records of our Bench and Bar by no less a person than Sir Wilfrid Laurier, who, in speaking in Toronto, told us how we ought to prize and preserve the speeches of eminent lawyers such as Edward Blake and the late B. B. Osler. I am glad to say that Mr. Morang, the publisher, to whom Sir Wilfrid publicly made the suggestion, has expressed his interest in the work, and is proposing to take it up, and I bespeak the co-operation of every member of the Bench and Bar in endeavouring to rescue from oblivion these mementoes of the past which we should not willingly let perish. Indeed, I would like this Association to go further and undertake the collection and arrangement not only of memorials, but, before it is too late, something of the wit and wisdom of our Bench and Bar, and secure its publication in one of our law magazines in such a manner that it can ultimately appear in book form. We have not here what they have in England, viz.: a cultivated and somewhat leisure class of briefless barristers, going circuit, whose keen interest in their profession leads them to preserve at all events the quips and jests of the circuit mess. Possibly we might supply their place, at all events in one respect, but the more important part of the work will need active co-operation by the members of the Association as to insure us against the loss of what is always recognized as very precious possession. Mr. Justice Bruneau, of Quebec, at a recent dinner of the Junior Bar of Montreal, urged that they should undertake the publication of a history of the members of the Bench and Bar in the Province of Quebec, with a view of keeping before the minds of the profession what prominent members of the Bar have done in the past to preserve the traditions of their forerunners and their devotion to the duties they had in hand.

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Among the things which a Bar Association may do is one which, if properly handled, may be of great usefulness. I mean the constant watch upon legislation, so as, from a purely legal standpoint, to prevent, or at all events to minimize, the passing of hasty, ill-considered, or inapt statutes. Of course there is always the danger that attention will be diverted from the language and its practical result and given to the effect, political or otherwise. But a committee of lawyers, distinguished for their learning instead of their politics, and presided over by a judge, could safely be trusted to adhere to their proper role. No doubt the suggestions emanating from such a committee will be met with some distrust, as coming from volunteer critics, but if those forming the proposed body act judiciously they may be of great help in supplying the place of the experienced counsel by whom in England legislation is revised.

I do not understand, however, that the duty of such a committee is limited to merely watching the phraseology of new law. We must remember, that, as said by Chief Justice Cockburn, "Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied."

It is our privilege as citizens, as well as our duty as members of a learned profession, to endeavour to take our part in the discussion of industrial and political changes which promise to make a momentous difference to the investment of capital on the one hand and the comfort and welfare of ourselves and of our fellow citizens on the other. We have been backward as a profession in this, but there is no body of men better fitted by their training and opportunities to lend assistance to the solution of these questions and to make their opinion felt not only in shaping legislation, but in moulding the convictions upon which it is founded.

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No one who has watched the trend of affairs both in Canada and in our own province can be ignorant of the fact that in recent years the ideas of public ownership and public and provincial control, as expressed in legislation, have modified our conception of vested rights and created many difficult situations. We have seen in this province two distinct views enunciated with regard to competition by the public with private enterprise. The Conmee Act illustrates one phase of the subject in which municipal enterprise was prevented from operating until it had bought out its private rival. The Hydro-Electric legislation exemplifies the contrary idea, that governmental, or municipal competition assisted by the Government, should freely enter into the domain of private monopoly without making compensation for loss of profit or being obliged to expropriate. Competition is the soul of trade, and it is universally accepted as the legitimate right of private individuals. But public rivalry has not yet settled down into a practice which is welcomed by everyone.

It must be evident that capital in its relations to the working classes; in its relation to a municipality and in its relation to a government is either recognizing or having forced upon it the realization that the old-fashioned immunity from direct obligations and from competition has passed away. This is to be seen in the progressive steps under which the Workmen's Compensation for Injuries Act has finally in England put the employer in the position of an insurer of his workmen. That situation has not arrived yet in this province, but it has been recommended by the Commission appointed by the New York Legislature and also by the Commission designated by the Government of Manitoba, and it is likely to be dealt with by the Commission to be nominated by the Ontario Government. The two Commissions which have reported have endeavoured to do away with the question of contributory negligence and to provide for direct liability in case of death and temporary disablement.

Opinions have differed as to the advisability of competition by a municipality or government with an existing industry or franchise, and many have advocated regulation instead of opposi-

tion. In this connection it may be interesting to note that President Brown, of the New York Central Railway, in his annual report recognizes that the influence and co-operation of Commissions of regulation have been uniformly beneficial to the road and have done much to improve the service for the public. This is the view generally expressed with regard to the work done by the Dominion Railway Commission and by the Ontario Municipal and Railway Board. But competition to an extent unknown before is advocated by many, and if approved will no doubt be of a much more important character than that with which we have been hitherto familiar. We are all accustomed to such old-fashioned examples as are shewn by the post office which is doing express company business in its parcel post service, and by national canals in keeping down the transportation rates of railway companies. The Dominion Government has not yet adopted any active policy of competition except with the Provincial Government in incorporating companies. But the International Waterways Commission and the Conservation Commission are now dealing with problems that will affect vested rights, and the legislation which may be adopted as the outcome of their work, and the special acts incorporating various power and other companies will raise interesting and important problems not only as to private interests, but as to provincial rights and powers.

The usefulness of such a committee as I have suggested might well be shewn not only in systematically perusing all bills dealing with these subjects when introduced, but in endeavouring—without any regard to political effect—to secure such temperate discussion and consideration as may help to mould the legislation carrying out the new ideas underlying them, so as to do the least measure of harm to those affected, and with as little disturbance to settled principles as is possible. The New York State Bar Association has a committee which watches not only legislation introduced, but that which is contemplated, and its deliberations and discussions, both oral and in print, have been most useful.

A very interesting contribution to the *Canada Law Times*, by Mr. J. D. Falconbridge, which was at a later date emphasized by

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the CANADA LAW JOURNAL, draws attention to the provision in the British North America Act, unused now for thirty-five years, for the assimilation of the laws of the various provinces upon subjects within their jurisdiction. There are many heads of law in which uniformity of enactment would be of great benefit to the community, considering the great volume of business between the provinces. Of these, insurance (in which the Civil Code and Statutes of Quebec are to be commended), the enforcement of judgments, the law of contracts, and the Workmen's Compensation for Injuries Acts afford excellent examples. On these subjects similarity of legislation would immensely simplify matters. Mr. Falconbridge draws attention to a Commission which is charged with the duty of endeavouring to systematize the various state enactments. The work of this Commission is most instructive and interesting, and we might, I think, endeavour to emulate its example.

One matter of interest to ourselves has been recently mooted, and that is the appointment of a French-Canadian Judge in Ontario. My own feeling is that in Ontario neither race, nor religion nor politics should enter into our calculations when an appointment to the Bench is to be made, and for that reason I should feel disposed to think that the contention put forward was inadmissible. But the request has perhaps a wider significance, and it should in justice to those who put it forward be fairly and thoroughly considered. The French language was preserved to the Province of Quebec after the Conquest, and it became one of the official languages of Canada. No one, however, can deny that it would, as a matter of business, be better for us, as a nation if the English language were spoken universally from the Atlantic to the Pacific. Should we then foster in any way the perpetuation of another language outside the limits originally assigned to it?

To extend the official use of the French language to Ontario courts would be the natural outcome of the appointment of a French-speaking judge. To do this would necessitate an amendment of the British North America Act.

In this connection the language of Michel, J., in *Lilburne's* case reported in Howard's State Trials, might well be adopted.

"You were speaking of the laws being in other tongues; those that we try you by are in English; and we proceed in English against you; and therefore you have no cause to complain."

An Act has been passed at the last session of our Legislature which will allow seven or eight of the younger men to be elected to the honourable office of Benchers of the Law Society. Benchers who have been elected for twenty years will continue in office, but their names will not be counted among the thirty elected members. Those who will be affected are, generally speaking, the elder brethren of the profession, against whom no one would vote. Indeed they are the men who ought to be honoured by the profession. Seven or eight seats which will thus be put at the disposal of the electorate, will, no doubt, be evenly divided between Toronto and the rest of the profession. At the last election the ten who came next to the first thirty included five Toronto barristers and five from outside cities and towns.

There are one or two matters which in conclusion I might bring before you. Our profession needs to wake up and insist on modern methods being adopted. We are working under a tariff over a half century old, and we still have to justify before a taxing officer each petty item of fifty or twenty-five cents. I refer not merely to the inadequacy of the tariff, but to its annoying and burdensome requirements, necessitating the keeping of dockets filled with the minutest particulars of work done and telephone messages sent and received. Some change is necessary whereby both we and our clients can ascertain by a system of block charges what the issue of a writ will cost, what a case can be taken down to trial for, what a trial would cost, and what an appeal will involve. This could readily be done if undertaken in a businesslike way.

The whole system of circuits needs reorganization; the development of legal business in Northern Ontario requiring more time to be given to that district, while in many of the Eastern counties circuits might be grouped, saving judicial time and

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strength. If in these united circuits courts were held at the county towns in rotation, no injustice would be done considering the volume of business transacted. Speaking of Toronto, there are only three jury sittings in a year, and much injustice is worked by the inability of the profession to secure in advance an order determining the mode of trial. Hence jury notices serve the purpose of delay, although when the cases are heard they may never be tried by a jury. The method adopted for non-jury work is productive of much inconvenience to the profession, and the public, and it is well that the latter should understand that the fault does not lie wholly with the legal profession. Three weeks' notice of trial is given, but when that time elapses, the case may either be put at once on the peremptory list or may find thirty or forty cases interposed, which have priority, and no one can rely upon any particular week or even any particular month for trial.

In the business activity which now prevails, it is a hard matter to get together witnesses on both sides. More than half the cases are not wholly local, and while the profession are frequently reprimanded for not being ready with non-jury cases the fact is that the system is to blame and lacks certainty and convenience. These difficulties are aggravated by the constant change of judges in the Divisional Court which makes it impossible for counsel to arrange their engagements from week to week with any degree of finality. Both the judges, the public and we ourselves would be better off if it were left to the clerk of assize to prepare for every day a list of cases that wanted to be heard.

It is not generally known that we are collecting fees by way of law stamps for the Government in payment of imaginary debentures, long since paid off by the transfer of valuable property to the province worth probably six times the amount of the debentures. This ought to be changed as these fees rest upon no real basis, and are collected from the clients as though they were part of the solicitor's bill. If some of these matters were remedied our life would be an easier one.

In conclusion, I wish you a very prosperous year, and thank you for the honour which you did me more than a year ago by electing me president of the Association.

*COMPANY LEGISLATION.*

In Canada we have had for some time a number of companies with provincial charters carrying on business in the four corners of the globe. On the other hand we have had companies with Dominion charters whose undertaking is confined wholly to one province.

In view of the fact that the powers of the provinces in regard to the creation of companies are limited by the British North America Act, and that the Legislature can only incorporate companies with "provincial objects," there have been doubts expressed from time to time as to the operations and securities of such provincial companies.

On the other hand we have seen frequent struggles between the local authorities and promoters who sought to get Dominion charters containing the "general benefit of Canada" declaration, when in reality they were frequently required for purely local purposes.

A still further point has been raised which will likely become of more critical importance in the near future, viz., the right of the provinces to make companies incorporated by the Dominion subject to the extra-provincial license laws.

It is understood that the Honourable Charles Murphy, Secretary of State, has now decided, with the co-operation of the Minister of Justice, to bring the legal issues involved in these matters before the Supreme Court. Having regard to the great extent of the interests involved, and the nature and complexity of the questions raised, it seems to be a matter for the State rather than for private individuals to have settled, and the action of the Secretary of State is to be commended.

*KING'S COUNSEL.*

Picking up the other day an old law list of Upper Canada, published by Rordans in 1858, we found that in that year the Bar of the province numbered 383, of whom only 28, one in every fourteen, were Queen's Counsel. In a little sketch of the history of the profession contained in the work it is said: "As this distinction confers professional rank on the recipient, it is seldom conferred, and then only for merit. Political services are not generally taken into account when the honour is bestowed. Of this we have a good illustration in the list of Queen's Counsel last gazetted (October, 1856). Upon the recommendation of the present Attorney-General, John A. Macdonald, of the eleven gentlemen then made entitled to silk gowns, two at least, at the time members of the Legislative Assembly, were in opposition to the Government that gazetted them."

Referring to the law list for the present year (1910), we find that the Bar now numbers 1578, and of these 341 are of His Majesty's Counsel, being one in every four and two-thirds—which goes to shew how extraordinarily meritorious the present Bar of the province is, compared with that of 1858, and yet when we look around its ranks for new judges, very few seem to shine forth with such distinction as to make them obviously fitting subjects for the promotion.

In the year 1858, though there were good and able men on the Bench, there were also in the ranks of the Bar men whose obvious fitness for promotion were plainly apparent to all.

We are sometimes inclined to think that the general decentralization of business which has been the darling project of all county practitioners for some years past, has had a deleterious effect on the Bar and left us with an abundance of men of mediocre qualifications, and at the same time deprived us of men of commanding ability, and for this reason, that skill and ability in the profession of an advocate depends largely on the opportunities he has for exercising his talents. The greatest advocates formerly always commanded the greatest practice. This

led to the concentration of business in the hands of a few who were generally overloaded, but by decentralizing business, it is more generally distributed, with the result that no one has an opportunity of gaining that abnormal skill and experience which go to make up the really great lawyer. Perhaps if the title of King's Counsel were not quite as lavishly distributed and were made, as it ought to be, the mark of conspicuous merit, then it might become more readily apparent who are the men from whose ranks the Bench should be recruited. It ought to be possible to say that any man of good moral character, who has attained a silk gown, and also is not too old, is a fitting person to be appointed a judge, but can we, as a matter of fact, say so now?

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*REVIEW OF CURRENT ENGLISH CASES.*(Registered in accordance with the Copyright Act.)

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**MARRIAGE WITH DECEASED WIFE'S SISTER—REPULSION FROM HOLY COMMUNION—7 EDW. VII. c. 47.**

*The King v. Dibdin* (1910) P. 57 is a case which has arisen under the Act permitting marriage with a deceased wife's sister (7 Edw. VII. c. 47). Prior to this Act such marriages had been declared by Parliament to be contrary to God's law and were regarded both civilly and ecclesiastically as incestuous. The recent Act removed the civil objection, but it was considered by the Rev. Canon Thompson that it had not removed the ecclesiastical offence and he accordingly rejected from communion a Mr. and Mrs. Banister, who had so offended. Mr. and Mrs. Banister then brought suit in the Ecclesiastical Court against Canon Thompson for a monition to abstain from denying the Sacrament to them, which was granted by the Dean of Arches, Dr. Dibdin, and the present proceedings were then commenced for a prohibition to the Dean of Arches from further proceeding in the matter. Darling, Bray and Lawrence, JJ., refused the rule, and from their decision an appeal was had to the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.), by whom the appeal was dismissed. It may be somewhat hard for some people to understand how Parliament can have any jurisdiction to remit sins. It may make a sinful act legal from the temporal standpoint, or free it from temporal punishment, but how it can give the sinner a clean bill of health spiritually, is one of those things that is not very apparent, and seems to require further elucidation.

**LEGITIMACY DECLARATION ACT, 1858 (21-22 VICT. c. 93), ss. 4, 11—(R.S.O. c. 135, s. 33)—MODE OF TRIAL—RIGHT TO TRIAL BY JURY.**

*Sackville-West v. The Attorney-General* (1910) P. 143. This was a petition under the Legitimacy Declaration Act, 1858 (21-22 Vict. c. 93), (see R.S.O. c. 135, s. 33), praying a declaration of the legitimacy of the petitioner. The petitioner applied that the issues of fact should be ordered to be tried before a jury. The motion was resisted, and it was held by Bigham, P.P.D., that the court had an absolute discretion under the Act as to the mode

of trial, and while admitting that if the questions to be decided at the trial were simple matters of fact it might be proper to direct a trial by jury, yet inasmuch as it appeared that already a great mass of evidence of over 2,000 folios had been taken abroad under commissions and would have to be read at the trial and questions of admissibility would have to be discussed and decided, he concluded that the case could not be conveniently tried before a jury, and he refused the application.

#### WILL—CONDITIONAL WILL.

*In re Vines, Vines v. Vines* (1910) P. 147. In this case a testator had made a will beginning, "If anything should happen to me while in India," whereby he left all his property to his wife. The will was made in 1872, while the deceased was in India. In 1876 he returned to England and was then asked by his wife if he was going to alter his will, and said, "No, it is all yours, and you are my all." He repeated this remark about a fortnight before he died, in October, 1908. His next of kin contended that the will was conditional, and the condition not having been fulfilled it was nugatory. Bigham, P.P.D., however, came to the conclusion that it was not conditional, that the words above quoted applied to what was to be done in case the testator died in India, but he considered the words "all property belonging to me at the time of my death to be disposed of to the best advantage, after paying all expenses the remainder to be paid to my wife," provided for the event of his dying at any time wherever he might be, and he therefore declared in favour of the will.

#### COMPANY—WINDING UP—CONTRIBUTORY—TRANSFER OF SHARES TO ESCAPE LIABILITY—BONA FIDES—EQUITIES BETWEEN TRANSFEROR AND TRANSFeree.

*Re Discoverers' Finance Corporation* (1910) 1 Ch. 312. In this case the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.J.J.) have affirmed the judgment of Neville, J. (1910) 1 Ch. 207 (noted ante, p. 167), and in doing so have overruled the decision of Parker, J. (1908) 1 Ch. 141 (noted ante, vol. 45, p. 149). The Court of Appeal holds that there is a distinction between companies which do, and which do not, give their directors a discretion as to approving of transfers. In the former case a shareholder may, up to the last moment, get rid of his liability on unpaid shares by transferring them to a man of

straw, provided he do so out and out, reserving no beneficial right therein; but where the directors have a discretion the shareholder cannot escape liability if he has actively or passively induced the directors to pass and register a transfer (even though it be out and out) which but for his conduct they would have refused to register.

**RESTRICTIVE COVENANTS—BUILDING SCHEME—SUBSEQUENT PURCHASERS—RIGHT OF SUB-PURCHASERS TO ENFORCE COVENANTS MADE TO A PRIOR VENDOR—NOTICE OF RESTRICTIVE COVENANTS.**

*Willé v. St. John* (1910) 1 Ch. 325. In this case the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.J.J.), have affirmed the judgment of Warrington, J. (1910) 1 Ch. 84, noted ante, p. 94.

**WILL—CONSTRUCTION—ABSOLUTE GIFT—SUBSEQUENT PROVISION FOR SETTLEMENT OF SHARE—TRUSTS BY REFERENCE TO MARRIAGE SETTLEMENT—DEFAULT OF ISSUE—ULTIMATE TRUST FOR TESTATOR, "HIS EXECUTORS, ADMINISTRATORS AND ASSIGNS."**

*In re Currie, Rooper v. Williams* (1910) 1 Ch. 329. In this case a testator had in his lifetime made a marriage settlement on his daughter's marriage, the ultimate trusts of which were in favour of himself, the settlor, his executors, administrators and assigns; by his will he gave his residuary estate to trustees upon trust for his children living at his decease as tenants in common, but went on to provide that the share which "would belong to" any daughter who at his death should be or have been married should "go and be paid to" the trustees of her marriage settlement to be held upon the same trusts as were thereby declared concerning the settled property or such of them as should be then subsisting or capable of taking effect. The share of the daughter in the residue was accordingly paid to the trustees of her settlement, and she and her husband having died without issue the question was whether the ultimate trust in favour of the testator, "his executors, administrators and assigns," took effect, or whether the residuary share in the circumstances passed to the daughter's personal representatives. Joyce, J., decided in favour of the latter alternative, on the ground that there was in the will first an absolute gift in favour of the daughter which on the authority of *Lassence v. Tierney* (1849) 1 Mac. & G. 551, was not a cut down by the subsequent direction to settle the share. That the ultimate trust in favour of the testator, if it

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had been contained in the will itself, would have been inoperative, and it was equally so when imported into the will by reference to the trusts of the settlement.

**COMPANY—DIRECTOR—CONTRACT OF SERVICE—RESTRAINT ON TRADE—WINDING UP—DISMISSAL OF SERVANT—SPECIFIC PERFORMANCE—INFORMATION ACQUIRED BY SERVANT DURING SERVICE—CONFIDENTIAL RELATION—INJUNCTION.**

*Measures Brothers v. Measures* (1910) 1 Ch. 336. In this case the defendant had agreed with the plaintiff company, of which he was a director, to hold office for seven years at a fixed salary, and had covenanted that so long as he should continue to hold office, he would not solely or jointly, with or as manager or agent for, any other persons or company, carry on or be engaged in any business that would compete with that of the plaintiff company. Before the term of seven years had expired the plaintiff company was ordered to be wound up at the instance of debenture holders, and the receiver and manager gave notice to the defendant that his services would be no longer required, and ceased to pay his salary. The defendant then commenced to carry on a similar business on his own account. During his employment as director he had made lists of the plaintiff company's customers, which he carried away with him and used for the purpose of soliciting the custom of such customers. The action was brought to restrain the defendant from carrying on business in competition with the plaintiff company, and to compel him to deliver up the list of the plaintiffs' customers. Joyce, J., who tried the action, held that the winding-up order having operated as a wrongful dismissal of the defendant, that he was no longer bound by his covenant, but that he had no right to make or take copies of the lists of the plaintiffs' customers for his own purposes, and he was accordingly ordered to deliver them up.

**CONFLICT OF LAWS—CONTRACT—CONTRACT TO ISSUE DEBENTURES—FLOATING CHARGE ON FOREIGN LAND—CLOG ON REDEMPTION—CHARTERED COMPANY—BREACH OF CHARTER—ULTRA VIRES.**

*British South Africa Co. v. De Beers Con. Mines* (1910) 1 Ch. 354. The plaintiff company was incorporated by Royal charter for the purpose of trading, and also for administering the government of certain regions in South Africa. By an agreement be-

tween the plaintiffs and the defendants, a company incorporated under the laws of Cape Colony, the defendants advanced a large sum to the plaintiffs on the security of debentures, which, by a trust deed, were made a floating charge on the plaintiffs' lands in South Africa, and by the terms of the agreement it was provided that should any diamondiferous ground, belonging to the plaintiffs, be discovered during the year in which the agreement was made, the defendants should be entitled to an exclusive license to work the same at a specified royalty. All advances having been paid off by the plaintiffs, the defendants, nevertheless, still claimed to be entitled to the exclusive right to work the diamondiferous ground. The plaintiffs claimed a declaration that the agreement was ultra vires of the plaintiff company, that it was a clog on the equity of redemption and therefore void, and that in any case all rights under it ceased on repayment. Questions of importance as to the law applicable were raised. The ground on which the agreement was claimed to be ultra vires was because by a clause in its charter the plaintiffs were prohibited from granting any monopoly of trade which it was contended an exclusive right to work all the diamondiferous ground within its territory would be, but Eady, J., was of the opinion that the clause in the charter referred to, had reference to its administrative powers, but did not affect the plaintiffs' right to deal with its proprietary rights as it should see fit. It therefore became unnecessary to decide the question of ultra vires, but the learned judge expressed the opinion that it cannot be assumed that if a chartered company does some act which is forbidden by its charter, the act is necessarily void as ultra vires, although it may lay the corporation open to have its charter revoked by the Crown. In which respect a common law corporation differs from a statutory corporation whose powers are strictly limited by its act of incorporation. The common law corporation having the same powers to contract as a natural person, but subject to the right of the Crown to intervene if it shall see fit in case of its doing anything forbidden by its charter. He was, however, of the opinion that the stipulation for the exclusive license was void as being a clog on redemption, and was in any case at an end when the debt was paid off. The contract was made in England and was English in form, and partly to be performed in England, and, as the learned judge found, by the intention of both parties was to be governed by the law of England, which he therefore held was applicable to it.

**ADMINISTRATION—ANNUITY—PECUNIARY LEGACIES—DEFICIENCY OF ASSETS—VALUATION OF ANNUITY—RIGHT OF ANNUITANT TO CAPITALIZED VALUE OF ANNUITY.**

*In re Cottrell, Buckland v. Bedingfield* (1910) 1 Ch. 402. In this case a testatrix had, by her will, given pecuniary legacies, and to her husband an annuity of one pound a week during his life, and she directed her trustees to appropriate and invest a sum and to apply the income, and if necessary the corpus to paying the annuity, and after her husband's death the residue of the fund was to fall into her residuary estate, which was to be held in trust for her son. The estate was insufficient to pay the legacies and to provide a sufficient sum to answer the annuity, but it was sufficient to pay the legacies, and the value of the annuity at the time of the testatrix's death. On a summons for directions, Warrington, J., held that the proper course for the trustees to adopt, was to value the annuity as at the date of the testatrix's death, and pay the amount of such valuation to the annuitant, or invest it in the purchase of an annuity as he should choose, and pay the pecuniary legacies in full.

**COMPANY—GENERAL MEETING—SPECIAL BUSINESS—NOTICE OF MEETING.**

*Betts & Co. v. Macnaghten* (1910) 1 Ch. 430. This was an action by the plaintiff company to restrain two persons from acting as directors. A notice was issued for an annual general meeting of shareholders, which stated that the meeting was for the purpose of considering, and if thought fit, passing certain resolutions "with such amendments and alterations as shall be determined on at such meeting." One of the resolutions was that three named gentlemen should be appointed directors. The three named gentlemen were proposed at the meeting, but by an amendment it was proposed that two additional directors should be appointed, which amendment was duly carried. The articles of association provided that notice of an ordinary general meeting should specify any special business to be transacted, and they also provided that the number of directors should be no less than three nor more than seven, and that the minutes of a meeting should be conclusive evidence that the proceedings were regular. Eve, J., held that the two additional directors had been regularly appointed, and that the business transacted at the meeting was within the scope of the special business indicated in the notice. The injunction, therefore, was refused.

**LANDLORD AND TENANT—COVENANT NOT TO PLOUGH UP PASTURE  
LAND—WASTE—GOOD HUSBANDRY—COSTS.**

*Rush v. Lucas* (1910) 1 Ch. 437 was an action by landlord against tenant to restrain the tenant from ploughing up pasture land, contrary to an alleged covenant. The demised premises consisted of a farm of 215 acres, and at the time of the lease all but 53 acres of arable land were in pasture. The tenant agreed not to plough up any pasture land, nor commit waste or spoil. Included in the 53 acres was a field of 22 acres which had been regularly tilled by the tenant for thirteen seasons prior to 1894, but in 1895 the tenant laid it down in grass because the crops had deteriorated. In 1901 he broke up 9 acres of this field, but in 1902 he re-laid it in grass. In 1909 the landlord gave notice to determine the tenancy. The tenant thereupon required the landlord to pay him for the grass land laid down by him, and on the landlord's refusal threatened to plough up this land again, and it was to restrain him from so doing that the action was brought. Eve, J., who tried the case held that upon the true construction of the agreement the clause against ploughing up pasture land only applied to the land in pasture at the time of the agreement, and that ploughing the land in question was not a breach of that agreement, nor would it be waste or spoil, and that an act which would not be a breach of the agreement while the tenant was not under notice to quit, could not be converted into a breach as soon as notice to quit was served, and that it was immaterial that the defendant's conduct was dictated by a desire to force the landlord to compensate him, and that that fact could neither affect the construction of the contract, nor disentitle the defendant to costs.

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REPORTS AND NOTES OF CASES.

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## Dominion of Canada.

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SUPREME COURT.

Quebec.] DESORMEAUX v. STE. THÉRÈSE. [Feb. 16.

*Appeal—Prohibition—Quebec case—R.S.C. 1906, c. 129, ss. 39 and 46.*

No appeal lies to the Supreme Court of Canada from the judgment of a court of the Province of Quebec in any case of proceedings for or upon a writ of prohibition. *Shannon v. Montreal Park & Island Railway Co.*, 28 Can. S.C.R. 374, overruled.

Appeal quashed with costs.

Cousineau, for motion. Surveyor, contra.

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N.B.] LOVITT v. THE KING. [March 11.

*Succession duties—New Brunswick statute—Foreign bank—Special deposit in local bank—Depositor domiciled in Nova Scotia—Debt due by bank—Notice of withdrawal—Enforcement of payment.*

L., whose domicile was in Nova Scotia, had, when he died, \$90,000 on deposit in the branch of the Bank of British North America at St. John, N.B. The receipt given him when the deposit was made provided that the amount would be accounted for by the Bank of British North America on surrender of the receipt and would bear interest at the rate of 3% per annum. Fifteen days' notice was to be given of its withdrawal. L.'s executors, on demand of the manager at St. John, took out ancillary probate of his will in that city and were paid the money. The Government of New Brunswick claimed succession duty on the amount.

*Held*, reversing the judgment of the Supreme Court of New Brunswick (37 N.B. Rep. 58), that the Government was not entitled to such duty.

*Held*, per DAVIES and ANGLIN, JJ., that notice of withdrawal could be given and payment enforced at the head office of the bank in London, England, and perhaps at the branch in Montreal, the chief office of the bank in Canada.

Appeal allowed with costs.

*Newcombe*, K.C., for the appellants. *Hazen*, K.C., Attorney-General of New Brunswick, for the respondent.

## Province of Manitoba.

### COURT OF APPEAL.

Full Court.]

RE SIMON.

[April 11.

*Will—Words of absolute gift to A. followed by direction that after death of A. on the happening of a certain event, the property be equally divided between B. and C.—Transfer under Real Property Act.*

Appeal from the refusal of the district registrar to register a transfer of land under the Real Property Act from the testator's widow in her capacity of executrix to herself individually in fee simple.

Testator by his will, after using words which imported an absolute gift of all his property to his widow, proceeded to direct that, upon the happening of a certain contingency, after the death of his widow, the property be divided equally between two named classes of persons. That contingency might still happen.

*Held*, that the district registrar was justified in refusing to register the transfer on the ground that the widow did not take an estate in fee simple under the will.

*Affleck*, for widow. *Wilson*, K.C., for the district registrar.

Full Court.]

SALTMAN v. MC CALL.

[April 14.

*Mortgagor and mortgagee—Redemption after sale by mortgagee—Real Property Act, R.S.M. 1902, c. 148, ss. 80, 108-112—Setting aside sale for gross under-value.*

Appeal from judgment of MACDONALD, J., noted, vol. 45, p. 757, dismissed with costs.

*Trueman and Levinson*, for plaintiff. *Galt*, K.C., and *Hoskin*, K.C., for respective defendants.

## KING'S BENCH.

Macdonald, J.] MURRAY v. HENDERSON. [April 18.

*Alien Labour Act, R.S.C. 1906, c. 97, s. 4—Action brought with written consent of Judge for violation of Act—Only the person who gets the consent can sue.*

Under s. 4 of the Alien Labour Act, R.S.C. 1906, c. 97, it is only the party or parties who obtain the written consent of a judge of the court that can be plaintiff or plaintiffs in an action to recover the prescribed penalty for violation of the Act.

The action in this case was accordingly dismissed with costs because it was brought by Ira S. Murray, whereas the consent was given on the application of Murray Brothers.

Cohen and Crichton, for plaintiff. A. M. S. Ross, for defendants.

Metcalfe, J.] [April 6.

## BANK OF BRITISH NORTH AMERICA v. WOOD.

*Chose in action—Assignment of—Notice to debtors—Right of assignee to moneys collected by assignor and handed over to another creditor—Estoppel by conduct—Duty of assignee to notify other creditors of the assignment.*

The plaintiffs had an assignment from one Thomas of all his book debts, notes and other choses in action as security for their claim, but did not notify the debtors or any of the other creditors of Thomas, although they knew there were such creditors. They allowed Thomas to collect the accounts and pay over the proceeds to them. The defendants, not knowing of the assignment, and having a large claim against Thomas, induced him to allow them to receive the proceeds of the collections of some of the debts and a number of the promissory notes covered by the assignment and the plaintiffs brought this action to recover these moneys and notes including some received after notice of the plaintiff's claim.

*Held, that the defendants were equitable assignees of all such moneys and notes as they had reduced into possession before receiving notice of the assignment and were entitled to retain them, but that the plaintiffs were entitled to judgment for all collections of book debts made by the defendants after receipt of such notice.*

*Held*, also, that there was no estoppel against the plaintiffs by reason of their failure to notify the defendants of their assignment.

*Troughton v. Gittley*, Amb. 630, and subsequent cases in which it was followed, distinguished.

*Galt*, K.C., and *C. S. Tupper*, for plaintiffs. *Hoskin*, K.C., and *Montague*, for defendants.

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## Bench and Bar.

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The retirement of the Hon. Mr. Justice Osler from the Court of Appeal on April 18th called forth a fitting and well-deserved tribute from the Bar of the province to the splendid services, extending over a period of thirty-one years, rendered to his country by that eminent judge.

On the assembling of the court, in presence of a large and representative gathering of members of the Bar, Sir AEmilius Irving, the venerable dean of the profession, representing the Benchers of the Law Society, the York County Law Association and the Ontario Bar Association, voiced the sentiments of the Bar.

"We are met," he said in part, "to do honour to an illustrious member of the Bench, who is about to retire. The importance of the occasion and the depth of feeling evoked are attested by the large attendance of members of the Bar who are desirous of shewing their loyalty to, and esteem, not only for a judge, but, if I may use so familiar a term, for a friend. Although we are sensible of the loss which the Bench and Bar sustain through the retirement of Mr. Justice Osler, we are rejoiced to know that we shall not lose him as our friend, that his retirement comes while he is still possessed of his brilliant powers, while he is still enjoying robust health and the honour, love and affection of his family and of troops of friends. While terms of encomium would be out of place at this tribunal—we esteem all the judges, the great body I am addressing, and the High Court as well—we may be allowed to say that Mr. Justice Osler has steadfastly upheld and splendidly exemplified the purity and learning of the Bench which lie so near the foundations of public liberty."

Chief Justice Moss, speaking for himself and his colleagues on the Bench fully concurred in the remarks of Sir AEmilius and

referred to the great personal loss they were sustaining through the retirement of one of their ablest members.

Mr. Justice Osler on rising to reply was visibly affected, almost overcome, by his emotions. He said in part:—

“Those of you who know me will, I am sure, know how difficult it is for me at this moment to express in any adequate way my sense of the honour which has been conferred upon me. I have during my connection with the Bench striven to live up to the high standard I set for myself on accepting a position on it. I feel it a high honour to be allowed to leave it, not in the cold silence of the most critical profession in the world, but with their approval as you have expressed it.

“As for the errors I have made—and no one is more acutely conscious of them than I am—some were capable of correction, and some were not, but I have the happiness of knowing that the court which, while it has the right to pardon, has also the prerogative to condemn, has extended its pardon to me. Let me wish you all happiness and prosperity, and through you to the several associations for their kindness in joining in this expression. And let me now bid you my judicial farewell.”

After bidding the assembled company his official farewell, he passed out of the court-room, receiving a friendly pat on the shoulder from Chancellor Sir John A. Boyd, the President of the High Court of Justice, who represented that court.

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#### *JUDICIAL APPOINTMENTS.*

James Thomas Brown, of Moosomin, in the Province of Saskatchewan, Esquire, one of His Majesty's counsel, to be puisne judge of the Supreme Court of Saskatchewan, in the room and stead of the Honourable Mr. Justice Prendergast, transferred to the Court of King's Bench of the Province of Manitoba.

The Honourable James Magee, a judge of the Supreme Court of Judicature for Ontario, and a member of the Chancery Division of the said High Court of Justice, to be a judge of the Court of Appeal for Ontario, with the title of Justice of Appeal, in the room and stead of the Honourable Featherston Osler, retired.

William Edward Middleton, of the City of Toronto, in the Province of Ontario, one of His Majesty's counsel, to be a judge of the Supreme Court of Judicature for Ontario, and a member of the Chancery Division of the said High Court of Justice, in the room and stead of the Honourable Mr. Justice Magee, transferred to the Court of Appeal for Ontario.

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## United States Decisions.

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**SALES.**—Executed Contract: Where it does not appear that goods shipped were not consigned to shipper's order, nor that the buyer received the goods from the carrier, an executed contract of sale is not shewn.—*American Jobbing Ass'n v. Wesson*, Ark. 122 S.W. 664.

**CARRIERS.**—Act of God: A snowstorm, which obstructed defendant's yard, held an "act of God," so as to relieve defendant from liability for non-delivery of the passengers.—*Cormack v. New York, N.H. & H.R. Co.*, N.Y. 90 N.E. 56.

**COMPROMISE AND SETTLEMENT.**—Consideration: Where a right is disputed and a compromise ensues, the compromise is supported by a sufficient consideration, and it will not be disturbed on it subsequently appearing that one of the parties thereto had no right in law.—*Wood v. Kansas City Home Telephone Co.*, Mo. 123 S.W. 6.

**CONTRACTS.**—Completion of Building: Where building material was furnished under a contract providing for payment of the price on completion of the building, the price was recoverable on the owner's failure to complete the work within a reasonable time.—*De Long v. Zeto*, 119 N.Y. Supp. 765.

**CRIMINAL LAW.**—Threat of Perjury Prosecution: That witnesses were told that the district attorney had said he would prosecute for perjury if they did not tell the truth, held not ground to set aside a conviction.—*State v. Williams*, La. 50 So. 711.

**DAMAGES.**—Excessive Verdict: A verdict for \$4,750 for injury to a telephone lineman by which he permanently lost the use of his right arm, underwent several operations, suffered much pain, and was confined to the hospital for a considerable time, held not excessive.—*Clark v. Johnson County Telephone Co.*, Iowa 123 N.W. 327.

**EXPLOSIVES.**—Care Required: The degree of care required of persons using such dangerous instrumentalities as dynamite in their business is of the highest, and what might be reasonable care in respect to grown persons of experience would be negligence as applied to children.—*Wood v. McCabe & Co.*, N.C. 66 S.E. 433.



"IT IS ALL OVER, BUT I THINK I HAVE DONE MY DUTY."

# Canada Law Journal.

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## *EDWARD, THE PEACEMAKER.*

The Canada Gazette of May 9th contained the following announcement:—

“His Excellency the Governor-General has received with the deepest distress the news of the death of His Majesty King Edward VII., communicated to His Excellency in the following cable from the Right Honourable the Secretary of State for the Colonies:—

“LONDON, May 6th, 1910.

“Profoundly regret to inform you His Majesty The King passed away at 11.45 p.m. to-night.

“CREWE.”

Into the many interesting details of the life and death of our late Sovereign, it is not our province to enter; suffice it for us to refer to some features of his character, and some events in his career, which shew how he gained that prominence among the great men of his day, and that influence over those who had the ruling of the nations in their hands, which, always exerted for good, gained him a title never before accorded to any earthly Sovereign. And that title was gained not by any ostentatious display of power, by the threat of the mailed fist, or the calling out of fleets or armies, nor by diplomatic manœuvring, nor even by the exercise of any extraordinary mental capacity. It came as the result of straightforward dealing, with no ulterior personal object, by a man who knew what he was talking about, whose gift of good common sense was aided by an experience in the public affairs, not only of Europe, but of the world at large, and a personal knowledge of the men by whom those affairs were conducted, such as no other man in public life possessed, or had the means of acquiring.

European statesmen knew that when advice was offered them it was given them for their own good, that no selfish scheme lay behind it, but they knew also that if they ventured to stray from the path of political rectitude there was a power supporting that kindly advice, and those words of wisdom, it would be not well for them to have to reckon with. They knew how stern that friendly visage could become, how quickly that open hand could close, and how hard that hand could strike if any attempt was made to presume upon its usual attitude of peace and goodwill. They knew that, however peaceful the inclination of the King might be, and however unwilling his people might be to engage in hostilities, the warlike instinct dormant there would brook no wrong, and suffer no injustice.

Thus it came about that on many occasions when the peace of Europe was threatened the well-timed and friendly mediation of the British Sovereign averted what might have led to terrible consequences.

But no monarch, however gifted, can be powerful abroad who is not loved and respected at home. And at home the King was both loved and respected. The great secret of his success lay in the mutual confidence which existed between him and his people. The King knew and trusted his people, and the people knew and trusted their King. They loved him as a man because he sympathized with them in their sorrows and rejoiced with them in their happiness. They respected him as a King for his wisdom and moderation. They felt that the affairs of state were safe in his hands, and that, however slight his actual power might be, it would always be exercised for the good of the people at large, and not for the benefit of any class, however influential.

One great element in the King's success was his versatility, and the tact which enabled him always to say and do the right thing. He never made the stupid mistakes that very clever people often do. Nor did he ever allow his kindly and affable demeanour to be taken as allowing any undue familiarity. Even as Prince of Wales his dignity was as carefully maintained as

when he ascended the throne. The following is an instance of the ready wit with which in gentle terms he rebuked an attempt to presume upon his good-nature. At a great gathering at Marlborough House a celebrated London tailor was one of the guests. Observing the nature of the assembly a certain person remarked to the Prince that his guests were not of a very exclusive character. "Well, Mr. P.," the Prince replied, "you know they could not all be tailors!"

At his country house at Sandringham, the King was a plain country gentleman, interested in his crops and his cattle, competing on even terms with other farmers at the shows, pleased when his sheep or his cattle were prize-winners, but ready to congratulate his fellow competitors when they were successful. He was there known as a good neighbour and a liberal landlord.

When staying abroad, or visiting, as he frequently did, those of his subjects with whom he was on terms of personal intimacy, he was a fine gentleman in the truest sense of the term—better qualified, indeed, to be called the "first gentleman in Europe" than was one of his predecessors to whom that title was given. Free from ostentation,—as a true gentleman is,—dignified, courteous, and self-respecting, he took an interest in whatever was going on, but never forgetting, in pursuing his own amusements, the claims which his subjects had upon his time, his sympathy and assistance.

Upon all state occasions he was "every inch a King." No personal inconvenience prevented him from upholding the dignity of the Crown, and representing in the fullest degree the grandeur of the state of which he was the titular head.

Not the least among his titles to respect was the decorum of his domestic life, and the care with which his children were so brought up as to fit them for the high positions to which they were born—a care for which the nation has now much reason to be thankful.

To his love for, and participation in racing, that form of sport so popular among all classes of Englishmen, to his reputa-

tion as a shot, to his prowess as a yachtsman, we need only refer as evidences of his many-sided character, and to which much of his personal popularity was owing.

Though never tried in war, albeit trained in both branches of the service, the King more than once gave evidence of that courage in the face of death which became his race and his lofty position, and at no time was his courage more nobly displayed than when in his last moments, knowing that his end was near, he calmly went on with his work till, when compelled at last to give up the struggle, he said with almost his latest breath, "It is all over, but I think I have done my duty."

The treaty with Japan, the friendly relations established with France, our hereditary foe, the good understanding brought about with Russia on many matters of common interest, and the constant endeavour to check the growing hostility to Germany, are among the events in the reign of the Peacemaker with which his name will be always associated. In the United States the King was always held in high esteem, and in no country has his death been more sincerely lamented, and his great qualities as a man and a ruler more truly appreciated.

Throughout the Empire, from the great dependencies in America, Asia, Africa, and Oceania, and from all the remote corners of the world, where one is constantly stumbling upon some unthought-of bit of British territory, has come a universal wail of grief at this sudden end of a glorious career, and the loss of one who was a personal friend of all his subjects.

At home, while for a moment the sounds of party strife have been hushed, it is keenly felt that when the contest is renewed how much will be missed that influence, always wisely employed, which might have done much to save from serious injury that constitution now so fiercely assailed; its value none more highly appreciated, its working by none better understood than by him who was its head. Nor did any one know better the temper of the British people nor discern more clearly the forces by which it would be governed. For guidance in these troublous times all

moderate men were looking with confidence to the King, and by them the loss of that guidance will be sorely lamented.

We cannot conclude this imperfect tribute of respect to our late most gracious Sovereign in words more fit than these we quote from a London journal: "The first of Englishmen has passed away—the monarch whose name is written among the highest in the roll of England's long line of Sovereigns, a patriot, a statesman, a governor, well fitted by the vigour of his intellect and the engaging charm of his temperament to be the actual as well as the ceremonial chief of the peoples he loved so well and of the Empire he ruled with such memorable success."

From the successor to the throne there is good reason to think that much may be hoped for. His education, his training, his surroundings, have been such as to fit him for his new responsibilities, and, though he may lack some of the qualities which endeared his father to the people, and has not the experience which only years can give, he has shewn a capacity for affairs which gives every prospect of successful attainment.

"THE KING IS DEAD—LONG LIVE THE KING."

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#### *DEFECTIVE SIDEWALKS AND ROADWAYS.*

Actions against municipalities for injuries caused by defective sidewalks or roadways, are fairly frequent, and it is a class of actions which the legislature in its wisdom has thought fit should be tried without the assistance of a jury, possibly from the fear that the sympathies of a jury might prevent them from viewing the facts proved before them in a fair and reasonable way. By section 104 of the Judicature Act therefore it is expressly provided that "all actions against municipal corporations for damages in respect of injuries sustained through non-repair of streets or sidewalks, shall be tried by a judge without a jury."

In a recent case of *Brown v. Toronto*, an attempt was made

very materially to limit the effect of this section by confining its operation to cases of simple non-feasance. In that case the plaintiff alleged that the defendants took up a sidewalk, and by not filling in, a hole was left, in consequence of which the plaintiff tripped and was thrown on to the roadway, sustaining injury thereby. No notice of the accident was alleged to have been given as required by s. 606 of the Municipal Act. Nor had the action been commenced within the time limited by that section.

The plaintiff filed a jury notice, and on a motion to strike it out as being contrary to the provisions of s. 104, it was contended that the wrong alleged on the part of the defendants was not mere non-feasance, but misfeasance in that the defendants removed the former sidewalk and actually created the bad state of repair. The Master in Chambers, however, came to the conclusion that the case was within the statute, and struck out the notice; on appeal to the Chancellor the notice was restored, because, as he thought, not only the method of trial, but also the question of whether the plaintiff could maintain the action at all, was incidentally involved by the determination of the question whether or not it was a case of misfeasance or non-feasance, and therefore, in his opinion it was better to leave the question open till a later stage.

From this decision an appeal was had, by leave, to the Divisional Court (Britton, Teetzel and Riddell, JJ.), and the order of the Chancellor was reversed and the order of the Master in Chambers was restored. Mr. Justice Riddell dealt very fully with the question, and came to the conclusion that s. 104 is not confined to cases of mere non-feasance, but in effect applies to every action for injuries sustained through "non-repair" of streets or sidewalks, however occasioned, where it is sought to make a municipality liable, and in his opinion "non-repair" means "a condition" quite irrespective of the question of how it has been brought about. At the same time the Divisional Court did not agree with the suggestion that the determination that the case was triable without a jury, necessarily involved the conclusion that the action was one within s. 606 of the Municipal Act.

This it may be observed settles a very important point of practice and virtually determines that all actions brought against municipal corporations for damages in respect of injuries sustained through defective streets or sidewalks, however the defect may have arisen, whether by non-feasance or misfeasance of the corporation or others are triable by a judge without a jury.

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#### *LEGAL PRESUMPTIONS.*

The *Sunday Chronicle*, in a mildly sarcastic sketch depicting a frivolous scene at the Dieppe Motor Races, passes defamatory remarks on "Artemus Jones, a churchwarden, married, and residing at Peckham." Mr. Artemus Jones, a barrister, who is neither a churchwarden nor married nor a resident of Peckham, brings an action for libel and is awarded very heavy damages. (*Jones v. E. Hulton & Co.*, L.R. [1900] 2 K.B. 444 *et seq.*, and L.R. [1910] A.C. 20 *et seq.*; *Wing v. London General Omnibus Co.*, L.R. [1909] 2 K.B. 652.) The House of Lords, upholding the decision of the Court of Appeal which (Lord Justice Moulton dissenting) had affirmed the judgment of the King's Bench, decides unanimously in favour of the plaintiff.

It was stated in evidence and admitted that neither the writer of the article nor the publishers knew or had heard of the plaintiff, and that they could have had no intention to libel or injure Mr. Artemus Jones, the barrister. The latter proved that the article was considered by a number of people to refer to him and that it did him a great deal of damage.

There were altogether (in the Courts of First Instance, of Appeal, and the House of Lords) seven judges for the plaintiff, Moulton, L.J., being the only one against him. Yet when we read the learned Lord Justice's striking judgment with its precise reasoning and its searching analysis of authorities, to shew that there can be no libel in the absence of libellous intent (*animus injuriandi*), which must be directed against the plaintiff

and so consciously present in the defendant's mind, we are strongly inclined to be convinced. Is there a flaw in Lord Justice Moulton's exposition of the law, and if so, where does it lie? We do not, I submit, get a direct answer from the other judgments.

As the judges arrive at their convergent result on more or less divergent routes, we might briefly review their reasoning. The Lord Chief Justice (p. 452) says: "If an untrue and defamatory statement in writing is published without lawful excuse, and in the opinion of the jury upon the evidence it refers to the plaintiff, the cause of action is made out. It is in my opinion clearly established by authorities that the question whether the article is a libel upon the plaintiff is a question of fact for the jury—and in my judgment this question of fact involves not only whether the language is libellous or defamatory, but whether the person referred to in the libel would be understood by persons who knew him to refer to the plaintiff."

His Lordship thus apparently takes the view that the bare fact of defamatory language being used which hits the plaintiff would be sufficient to render defendant liable.

Otherwise Lord Justice Farwell (p. 480ff) : "So the intention to libel the plaintiff may be proved not only when the defendant knows and intends to injure the individuals, but also when he has made a statement concerning a man by a description by which the plaintiff is recognized by his associates, if the description is made recklessly, careless whether it hold up the plaintiff to contempt or ridicule or not. In such a case it is no answer for the defendant to say that he did not intend the plaintiff. . . Negligence is immaterial on the question of libel or no libel. The recklessness to which I have referred, founding myself on *Derry v. Peek*, is quite different from mere negligence."

We see that Lord Justice Farwell postulates that which the civilians would, I believe, term culpa lata on the part of the defendants, and that the mere act and its consequences would not satisfy him.

The judgments of the Lords of Appeal are brief. The Lord Chancellor lays down this proposition: "His (the plaintiff's) intention—is inferred from what he did," but modifies it afterwards by saying: "The jury was entitled to think—that some ingredient of recklessness or more than recklessness entered into the writing and the publication of this article."

Lord Atkinson concurs with the Lord Chancellor's judgment and also "substantially" with the judgment of Farwell, L.J.: "I think he has put the case on its true ground and I should be quite willing to adopt in the main the conclusions at which he has arrived."

Lord Gorell concurs with the Lord Chancellor's judgment and with the observations Lord Atkinson had made upon the judgment of Farwell, L.J.

Lord Shaw, of Dunfermline, concurs in the observations made by the Lord Chancellor and also with those made by the Lord Chief Justice.

Having regard to all these utterances I think we shall not err if we draw this conclusion, that in cases like the present an irrefutable inference is raised either of culpa lata or of dolus, and that thereby the conditions of the law of tort are satisfied. This inference (*præsumptio juris et de jure*, a fiction against which there is no defence) was left out of consideration by Lord Justice Moulton, and that, we must assume, was the flaw in his judgment.

But the question arises: Was, in these circumstances of the law, the verdict of the jury at all necessary, and, if so, was Mr. Justice Channell's summing up adequate? Should he not have directed them to say whether in their opinion the defendants published those statements recklessly or mala fide?

Another recent case implying or suggesting the question of a legal presumption, though of a different kind (*præsumptio juris*), is *Wing v. London General Omnibus Company*. A motor omnibus on a wet road skids, and a passenger incidentally gets injured. No negligence as regards the condition, management or control of the omnibus is alleged. Plaintiff's counsel ad-

vances the maxim *res ipsa loquitur*. Lord Justice Moulton discusses the latter in his judgment. He takes the view that the principle only applies "when the direct cause of the accident or so much of the surrounding circumstances as was essential to its occurrence were within the sole control and management of the defendants or their servants, so that it is not unfair to attribute to them a *prima facie* responsibility for what happened. An accident in the case of traffic on a highway is in marked contrast to such a condition of things. Every vehicle has to adapt its own behaviour to the behaviour of other persons using the road." I observe that Moulton, L.J., was the only judge who entered into this question. The other judges did not even refer to it, and with due respect I venture to say, rightly so. In my opinion that maxim is altogether inapplicable to the present case, though for some other reason than that the case related to traffic.

The maxim *res ipsa loquitur*, the origin of which I am unable to trace, and which I believe is absent from Continental jurisprudence, is apparently only an expedient which the sense of equity in our courts has created, as a relief against the rigid principle *affirmanti non neganti incumbit probatio* for cases in which, to use the language of Pollock, C.B., in *Byrne v. Bondle*, 2 H. & C. 722, "it would have been preposterous to put upon the plaintiff the obligation to prove the defendant's negligence." In other words, some fact or facts which under ordinary circumstances would have to be proved by the plaintiff, in order to complete the chain of his evidence, would in such cases have to be proved or disproved by the defendant.

Now in the present case there were no facts to be proved. All the essential facts were absolutely clear and beyond dispute, and no shifting of the onus probandi on the basis of that maxim was needed or indeed possible. The only question was: Does the user of a motor omnibus on a wet road constitute negligence (or a nuisance)? Such a question, however, is not in the nature of a fact but in that of an opinion formed on facts (for judge or jury, as the case may be, to pronounce). For

this reason I believe the maxim cannot apply and should not have been dragged in.

Whether Lord Justice Moulton's obiter dictum, in so far as on principle it would exclude all cases of traffic from the operation of that rule of evidence, will be adopted, remains to be seen.—*Law Magazine and Review*.

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The origin of a well-known "dog Latin" phrase may not be very well known, and for the information of those who do not know it, and to recall it to those who do, we give the following extract from a book entitled "Authentic Letters from Upper Canada," by T. W. Magrath, published in Dublin, 1833. The scene is laid in York, now Toronto. Mr. Magrath writes as follows:—

"A writ against a debtor liable to the law of arrest, was put into the hands of one of our sheriffs—a fat and unwieldy person—to whom the debtor was pointed out, and finding himself hard pressed by the sheriff (who was well mounted) made off for a morass, into which he dashed, laughing heartily at his pursuer. Now the puzzle to the sheriff was how to make a proper return on the writ—he could not return "non est inventus," for he had found his prey; he could not return "cecpit," as he had not succeeded in the capture. So after much deliberation, he made out the return "non est comeatibus in swampo."

**REVIEW OF CURRENT ENGLISH CASES.**

(Registered in accordance with the Copyright Act.)

COMPANY—SHARES—EXECUTORS—PROBATE—TRANSFER BY EXECUTORS TO ONE OF THEMSELVES—NOMINAL CONSIDERATION—BREACH OF TRUST—NOTICE—REVOCATION BY ONE TRANSFEROR—REFUSAL TO REGISTER TRANSFER—DIRECTOR'S QUALIFICATION.

*Grundy v. Briggs* (1910) 1 Chy. 444 was an action against three directors of a limited company to restrain the defendants from preventing the plaintiff from acting as a director, and to rectify the register of shareholders by registering him as the owner of fifteen shares in the following circumstances. One James Grundy died entitled to 112 shares of the stock of the defendant company, he made a will appointing the plaintiff and four other persons his executors. The probate of the will was produced to the company and the executors were registered as the owners of the shares. Subsequently the plaintiff was elected director, and with the object of qualifying him the executors executed a transfer to the plaintiff of fifteen shares for a nominal consideration. Before this transfer was registered one of the executors notified the company that he withdrew his signature, and that the transfer was a breach of trust and requested the company not to register it. The directors of the company thereupon refused to register the transfer, and subsequently informed the plaintiff that he had ceased to be a director by reason of his not having acquired the necessary qualification, and thenceforward excluded him from the directors' meetings. Eve, J., who tried the action, held that the plaintiff was entitled to succeed, and that the refusal to register the transfer was not justifiable, because the company were not warranted in gratuitously assuming that the transfer necessarily involved a breach of trust, or, in the absence of any specific reason being given for the withdrawal of the signature, in refusing to register the transfer. He held that the proper course for the directors to take would have been to notify the objecting executor that they would register the transfer unless within a specified time he obtained the order of the court prohibiting its registration. He therefore held that the plaintiff was entitled to have the transfer registered. But in

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his opinion, this point was immaterial to the plaintiff's right to act as director, because he also held that as a joint holder of the testator's shares the plaintiff was sufficiently qualified.

**LESSOR AND LESSEE—COVENANT NOT TO ASSIGN WITHOUT LEAVE—  
LEAVE "NOT TO BE UNREASONABLY OR ARBITRARILY WITHHELD"  
—UNREASONABLE CONDITION — DECLARATORY JUDGMENT —  
COSTS.**

*Evans v. Levy* (1910) 1 Ch. 452. In this case the plaintiff was assignee of a lease which contained a covenant not to assign without leave of the lessors, but such leave was not to be unreasonably or arbitrarily withheld. The plaintiff desired to assign the term to his wife. The defendants, the lessors, refused to consent unless the plaintiff entered into a covenant to pay the rent during the residue of the term and perform all the covenants of the lease on the part of the lessee as if he had been a party thereto. Eve, J., held that this was an unreasonable condition to impose, and made a declaratory order that the plaintiff was entitled to assign the lease without the license of the lessors and free from conditions, but as no relief was sought against the lessors he made the order without costs. The learned judge expresses the opinion that having regard to the fact that the proposed transferee was a married woman it would not have been unreasonable to have made it a condition that the husband should give a covenant as surety for the payment of the rent by his wife during her tenancy.

**LIFE ASSURANCE COMPANY—LIQUIDATION—TRANSFER OF BUSINESS  
TO ANOTHER COMPANY—DEPOSIT WITH GOVERNMENT—RIGHTS  
OF POLICY-HOLDERS—(R.S.C. c. 34, s. 12).**

*In re Life & Health Assurance Association* (1910) 1 Ch. 458. In this matter a life insurance company having made the usual deposit with government for the security of policy-holders, went into voluntary liquidation, and in the course of the liquidation proceedings its current business was agreed to be transferred to another company, which, under the agreement, assumed all liability to the current policy-holders. An application was then made to Eve, J., by the liquidators for the return to them of the government deposit, but he held that unless all the policy-holders of the company released and abandoned their claims against the

company and the deposit, and accepted the liability of the purchasing company, the deposit ought not to be ordered to be returned to the company. The application was therefore ordered to stand over with leave to amend.

PARTNERSHIP—NOTICE OF DISSOLUTION—PARTNERSHIP TERMINABLE BY MUTUAL AGREEMENT—PARTNERSHIP ACT, 1890 (53-54 VICT. c. 39), ss. 26, 32.

In *Moss v. Elphick* (1910) 1 K.B. 465, a Divisional Court (Darling and Pickford, JJ.), determined that when by the terms of a partnership it is to be terminable by mutual agreement, it is not open to either partner to put an end to it by notice, notwithstanding that s. 26 of the Partnership Act, 1890, provides that a partnership for "no fixed time" may be dissolved by notice, and s. 32 provides that "subject to any agreement" a partnership for "an undefined time" may also be dissolved by notice. Here the agreement of the parties was held to control the construction of both sections.

RAILWAY COMPANY—CARRIER—UNPACKED GOODS—OWNER'S RISK  
—REASONABLE CONDITION.

*Sutcliffe v. Great Western Ry.* (1910) 1 K.B. 478. In this case the plaintiffs had for many years consigned wooden cisterns, lined with lead and fitted with a cross bar, and lever, which projected above the edge of the cistern, for carriage by the defendants unpacked, and at the defendants' risk. Many of the cross bars and levers having been broken in transit, in 1907 the defendants notified the plaintiffs that thereafter the defendants would only accept them unpacked at the plaintiffs' risk, except on proof that damage, if any, arose from the wilful acts of the defendants' servants. The plaintiffs claimed that the requirement of packing, and the refusal to accept the cisterns unpacked except at the plaintiffs' risk, were unreasonable conditions, and the County Court judge so held, and his decision was affirmed by the Divisional Court (Darling and Jelf, JJ.), but the Court of Appeal (Williams, Buckley and Kennedy, L.J.J.) came to the conclusion that, in the circumstances, the conditions were reasonable and just, and the orders of the courts below were therefore reversed.

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TRADE UNION—RESTRAINT OF TRADE—ILLEGALITY OF SOCIETY AT COMMON LAW—RULES OF TRADE UNION—CLAIM TO BENEFIT UNDER TRADE UNION RULES—ACTION AGAINST TRADE UNION—TRADE UNION ACT, 1871 (34-35 VICT. C. 31), SS. 3, 4—(R.S.C. C. 125, SS. 2, 4).

*Russell v. Amalgamated Society of Carpenters* (1910) 1 K.B. 506. This was an action by a member of a trade union against the union to recover certain sick and superannuation benefits, which it was claimed were payable to the plaintiff under the rules of the union, and the case illustrates the very anomalous condition in which trade unions stand under the law. The Trade Union Act expressly authorizes unions to be formed for purposes which, but for the Act, would be illegal; but it also provides in effect that the members of the union shall not be entitled to the aid of the courts of law to enforce any claim for damages for breach of any agreement between the members as to selling goods, transacting business or employing or being employed, or for payment of any subscription or penalty, or as to the application of the funds to provide benefits to members, etc. (see R.S.C. c. 125, s. 4). The defendant union combined in its rules provisions for carrying on the militant work of the union, and provisions of a provident nature as are usual in friendly societies; and it was provided by the rules that members might be expelled, and thereby lose all future benefit in the funds of the society, for non-compliance with militant operations of the union according to the decisions of committees. It was sought in the present case to separate these operations of the society, and in so far as they were of the nature of a friendly society, it was contended that a court of law might give aid in carrying them out. Phillimore, J., who tried the case, gave judgment for the defendants, and the Court of Appeal (Williams, Farwell and Kennedy, L.J.J.) affirmed his decision, holding that the main object of the union was illegal at common law, as being in restraint of trade, and that the rules relating to the provident operations of the union were so inseparably connected with that object, as to be affected by its illegality, and therefore unenforceable by action.

COSTS—TAXATION—APPEAL, COSTS OF—COPIES USED IN PRIOR PROCEEDINGS.

In *Masson v. De Fries* (1910) 1 K.B. 535 a small point of practice was involved. An appeal to the Court of Appeal had

been dismissed with costs, and the respondent claimed to be allowed, as part of his costs of appeal, copies of documents which had been used in the appeal, but which had been prepared for and been used on a prior appeal to a Divisional Court. The taxing Master disallowed these items and, on appeal, Lawrence, J., held that the Master was right, and the Court of Appeal (Williams and Farwell, L.J.J.) affirmed the decision of Lawrence, J.

**WORKMEN'S COMPENSATION — WORKMAN EARNING MONEY IN ANOTHER CHARACTER—COMPENSATION.**

In *Simmons v. Heath Laundry Co.* (1910) 1 K.B. 543 the plaintiff was employed in a laundry, and in the course of her employment she sustained an injury. She earned 7s. a week in the laundry and also gave music lessons, by which she earned 3s. a week, and in fixing compensation the question arose whether her earnings in the latter capacity could be taken into account, the amount of compensation being regulated by the earnings of the injured person. The County Court judge held that only the earnings in the laundry could be taken into account, and the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.J.J.) affirmed his decision.

**DEFAMATION—SLANDER—WORDS ACTIONABLE PER SE—INNUENDO—CHARGE OF CRIMINAL OFFENCE—PUNISHMENT—LIABILITY TO ARREST.**

*Hellwig v. Mitchell* (1910) 1 K.B. 609 was an action of slander. The statement of claim alleged that the defendant, who was proprietor of a hotel, had said to the plaintiff, "I cannot have you in here; you were on the premises last night with a crowd, and you behaved yourself in a disorderly manner and you had to be turned out," and upon the plaintiff protesting that the defendant had made a mistake, the defendant said, "Oh, no, I have not made any mistake, and there are plenty of people here now who saw you and the disorderly way in which you behaved; you have to go out at once; and if you don't go I shall call in the police and have you turned out." The innuendo charged was that the plaintiff had committed a breach of the peace and refused to quit licensed premises, and as thereby having committed criminal offences. No special damage was alleged. On a motion

by way of demurrer to the statement of claim, Bray, J., held that the words charged imputed that the plaintiff had been guilty of an offence punishable by fine only, which, though it involved a liability to summary arrest, nevertheless afforded no cause of action in the absence of any special damage, and the action therefore was dismissed.

**LANDLORD AND TENANT—LEASE TERMINABLE ON CONTINGENCY—**

**NOTICE OF INTENTION TO SURRENDER—ACCEPTANCE OF SURRENDER UNDER MISTAKE OF FACT—LIABILITY OF TENANT FOR RENT NOTWITHSTANDING SURRENDER.**

*Gray v. Owen* (1910) 1 K.B. 622 was an action by a landlord to recover rent in the following circumstances. The plaintiff let a house to the defendant, who was a naval officer, subject to a proviso "that should the tenant be ordered away from Portsmouth by the Admiralty he may determine this agreement by giving the landlord one quarter's notice in writing." The Admiralty in February, 1908, did order the defendant away, but subsequently at his request cancelled the order. On 25th March, 1908, he gave notice of his intention to quit, and the plaintiff under the belief that the defendant was under orders of the Admiralty to leave Portsmouth accepted the notice, and in June, 1908, received possession and advertised the house for sale. Subsequently the plaintiff discovered the true facts and brought the action to recover the rent from June to December, 1908. The County Court judge who tried the action thought that as the defendant had been ordered to leave Portsmouth he was entitled to give the notice notwithstanding the subsequent cancellation of the order, and that the plaintiffs' acceptance of possession effected a surrender in law of the term, he therefore dismissed the action, but the Divisional Court (Bucknill and Phillimore, JJ.) reversed his decision, being of the opinion that the defendant in giving the notice after the Admiralty order had been cancelled, was guilty of a breach of contract, and though the acceptance of possession by the plaintiff had worked a surrender of the term, and relieved the defendant from liability for rent; yet that fact did not preclude the plaintiff from recovering for the breach of contract, and the measure of damages therefor was the amount of rent which he had lost. The appeal was therefore allowed and judgment given for the plaintiff for the amount claimed.

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**CRIMINAL LAW—EVIDENCE—STATEMENT BY PRISONER READ OVER TO CO-PRISONER—DENIAL OF TRUTH OF STATEMENT—ADMISSIBILITY OF STATEMENT OF CO-PRISONER.**

*The King v. Thompson* (1910) 1 K.B. 640. In this case two prisoners, Archer and Thompson, had been indicted for burglary. Archer pleaded guilty, and Thompson not guilty. Prior to the trial a statement in writing signed by Archer, admitting his guilt and implicating Thompson was read over to Thompson, who declared it to be "a pack of lies." On his trial this statement was put in as evidence against him, and on his behalf it was contended that as against him, as he had denied its truth, it was inadmissible. The Court of Criminal Appeal (Lord Alverstone, C.J., and Ridley and Darling, J.J.), held that the statement was admissible, but on what principle the confession of one man is evidence against another is not explained. It is true that the judge at the trial cautioned the jury against accepting anything in the statement as in any way true, and not to let the statement prejudice them in any way, but if the statement was not evidence to establish the guilt of the prisoner Thompson, for what purpose it could be evidence at all we fail to understand.

**REPORTS AND NOTES OF CASES.****Dominion of Canada.****SUPREME COURT.**

N.S.]

[March 11.

**SAINT MARY'S YOUNG MEN'S TOTAL ABSTINENCE SOC. v. ABLEC.***Lease—Construction of covenant—Taxes—Partial exemption.*

A society owned a building worth about \$20,000 which, by the statute law of the province, was exempt from municipal taxation so long as it was used exclusively for the purposes of the society. A portion of the building having been used at intervals for other purposes, it was assessed at a valuation of \$1,000, and the society paid the taxes thereon for some years. Such portion was eventually leased for a term of years to be used for other purposes than those of the society, and the valuation for assessment was increased to \$10,000. The lease contained this covenant: "The said lessees . . . shall and will well and truly pay or cause to be paid any and all license fees, taxes or other rates or assessments which may be payable to the city of Halifax, or chargeable against the said premises by reason of the manner in which the same are used or occupied by the lessees hereafter, or which are chargeable or levied against any property belonging to the said lessees (the said lessor, however, hereby agreeing to continue to pay as heretofore all the regular and ordinary taxes, water rates and assessments levied upon or with respect to said premises, and the personal property thereon belonging to the lessor)." The society was obliged to pay the taxes on such increased valuation and brought action to recover the amount so paid from the lessees.

*Held, FITZPATRICK, C.J., and ANGLIN, J., dissenting,* that the taxes so paid were "regular and ordinary taxes" which the lessors had agreed to pay as theretofore and the lessees were not liable therefor on their covenant. Appeal dismissed with costs.

*O'Connor, for appellants. Newcombe, K.C., for respondent.*

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B.C.]            BURRARD POWER CO. v. THE KING.            [Feb. 15.

*Constitutional law—Legislative jurisdiction—Crown lands—Terms of union of British Columbia, art. 11—Railway aid—Provincial grant to Dominion—Intrusion—Provincial legislation—Water-records within railway belt—B.N.A. 1867, ss. 91, 109, 117, 146—Imperial order in council, May 16, 1871—Water Clauses Consolidation Act, B.C.*

While lands within the "Railway Belt" of British Columbia remain vested in the Government of Canada in virtue of the grant made to it by the Government of British Columbia pursuant to the eleventh article of the "Terms of Union" of that province with the Dominion, the Water Commissioners of the Province of British Columbia are not competent to make grants of water-records, under the provisions of the Water Clauses Consolidation Act, 1897, R.S.B.C., c. 190, which would in the operation of the powers thereby conferred interfere with the proprietary rights of the Dominion of Canada therein. Cf. *The Queen v. Farwell*, 14 Can. S.C.R. 392.

Judgment appealed from, 12 Ex C.R. 295, affirmed. Appeal dismissed with costs.

*Lafleur*, K.C., for appellants. *Newcombe*, K.C., for respondent.

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B.C.]            [Feb. 15.

BRITISH COLUMBIA ELECTRIC RY. CO. v. CROMPTON.

*Construction of statute—Limitations of actions—Contract for supply of electric light—Negligence—Injury to person not privy to contract.*

The appellant company, having acquired the property, rights, contracts, privileges and franchises of the Consolidated Railway and Light Company, under the provisions of the Consolidated Railway Company's Act, 1896, 59 Vict. ch. 55 (B.C.), is entitled to the benefit of the limitation of actions provided by s. 60 of that statute, IDINGTON, J., dissenting.

The limitation so provided applies to the case of an infant injured while residing in his mother's house by contact with an electric wire in use there under a contract between the company and his mother.

Judgment appeal from, 14 B.C. Rep. 224, reversed, DAVIES and IDINGTON, JJ., dissenting. Appeal allowed with costs.

*McPhillips*, K.C., for appellants. *Travers Lewis*, K.C., for respondent.

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Ex. C.]

BOULAY v. THE KING.

[Feb. 15.

*Contract—Delivery of goods—Conditions as to quality, weight, etc.—Inspection—Rejection—Conversion—Sale by Crown officials—Liability of Crown—Deductions for short weight.*

The Minister of Agriculture of Canada entered into a contract with the suppliants for the supply of a quantity of pressed hay for the use of the British army engaged in the operations during the late South African war, the quality of the hay and the size, weight and shape of the bales being specified. Shipments were to be made f.o.b. cars at various points in the Province of Quebec to the port of Saint John, N.B., and were to be subject to inspection and rejection at the ship's side there by government officials. Some of the hay was refused by the inspector, as deficient in quality, and some for short weight in the bales. In weighing, at Saint John, fractions of pounds were disregarded, both in respect to the hay refused and what was accepted; there was also a shrinkage in weight and in number of bales as compared with the way-bills. The hay so refused was sold by the Crown officials without notice to the suppliants, for less than the prices payable under the contract and the amount received upon such sales was paid by the government to the suppliants. In making payment for hay accepted, deductions were made for shortage in weights shewn on the way-bills and invoices, and credit was not given for the discarded fractions.

*Held*, the CHIEF JUSTICE and DAVIES, J., dissenting, that the appellants were entitled to recover for so much of the amount claimed on the appeal as was deducted for shrinkage or shortage in the weight of the hay delivered on account of the government weighers disregarding fractions of pounds in the weight of the hay actually accepted and discharged from the cars at Saint John.

Per GIBOARD, IDINGTON and DUFF, JJ., CHIEF JUSTICE and DAVIES and ANGLIN, JJ., dissenting, that the manner in which the government officials disposed of the hay so refused amounted

to an acceptance thereof which would render the Crown responsible for payment at the contract prices.

Judgment appealed from, 12 Ex. C.R. 198, reversed in part, the CHIEF JUSTICE and DAVIES, J., dissenting. Appeal allowed in part with costs.

*J. A. MacInnes*, for appellants. *Newcombe*, K.C., for respondent.

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## Province of Ontario.

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### COURT OF APPEAL.

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Moss, C.J.O.]

[April 25.

*McCARTHY & SONS Co. v. W. C. McCARTHY.*

*Appeal—Court of Appeal—Security for costs—Dispensing with security—Property of appellant in hands of respondents.*

Motion by the defendant for an order dispensing with the giving of security for costs of an appeal to the Court of Appeal from the order of a Divisional Court, or reducing the amount of the security to be given.

*Featherston Aylesworth*, for defendant. *Grayson Smith*, for plaintiffs.

Moss, C.J.O.:—An appellant applying for an order dispensing with the giving of security for costs under Rule 826, or reducing the amount of the security to be given, must make out a case beyond reasonable doubt. The onus is upon him, and the matter should not be left in uncertainty. The ground presented in this case is that the plaintiffs have in their hands or under their control, by means of a receiving order, property or means of the defendant sufficient to answer their costs of the appeal, and which would, in the event of the appeal failing, be available for that purpose. But I am not satisfied as to this upon the material before me. There is a conflict as to the value of the 63 shares and as to the extent of the charges against them and the policies of life assurance, as well as to the full amount of the claims against the defendant in respect of which they may be made exigible. The matter is left in too much uncertainty to justify

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a departure from the general rule. *Re Sherlock*, 18 P.R. 6; *Thuresson v. Thuresson*, Ib. 414.

The motion must be refused; but, having regard to all the circumstances, the costs may be in the proposed appeal.

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## HIGH COURT OF JUSTICE.

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Meredith, C.J.C.P.—Trial.]

[Jan. 13.

THE KING *v.* MARTHA SCOTT.

*Murder—Self-defence and justification—Previous threats and violent conduct of deceased towards accused—Grounds for apprehending that life endangered—Assaults upon others of which accused had information—Violent temper of deceased—Evidence of his character—Cr. Code (1906) secs. 53, 259.*

1. In support of a plea of self-defence in a homicide case and as shewing grounds for apprehending that the life of the accused was in danger, evidence is admissible of previous assaults and attempted assaults by the deceased upon the accused and of threats made by him against the accused.

2. Evidence is also admissible for the defence of assaults made by the deceased upon others of which the accused knew at the time of the shooting, as shewing the violence which the accused might expect from him.

3. Evidence merely of the bad character of the deceased is not admissible, but the defence may shew that the deceased was a man of violent temper.

W. M. Reade, K.C., for the Crown. E. Meredith, K.C., for the prisoner.

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Meredith, C.J.C.P.]

[April 21.

RE GILES AND TOWN OF ALMONTE.

*Municipal corporations—Local option by-law—Voting—Form of ballot—Departure from statute.*

Motion by William Giles to quash a by-law of the town prohibiting the sale by retail in the town of spirituous, fermented, and other manufactured liquors, on the ground that the form

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of ballot used in voting upon the by-laws was not that prescribed by the statute of 1908.

*Held*, that the expressed wish of the voters ought not to be defeated by the clerk's mistake in departing from the words of the statutory form, where it is not shewn that the departure confused any one and so prevented the will of the voters from being manifested; that the circumstances brought the case within the gauge of the Interpretation Act, 7 Edw. VII. c. 2, s. 7(35); and, while it is a matter of regret that a municipal officer should depart from the plain directions of a statute, the by-law should not be quashed. Motion dismissed without costs.

*Haverson*, K.C., for applicant. *Raney*, K.C., and *J. Hales*, for respondents.

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Meredith, C.J.C.P.]

[April 22.

RE GREEN v. CRAWFORD.

*Division Courts—Jurisdiction—Promissory note for more than \$100—Item in larger account—Merger in mortgage—Matters of defence.*

Motion by the plaintiff for a mandamus to the junior judge of the County Court of Elgin, commanding him to try this action, which was brought in the 3rd Division Court in the county of Elgin, upon a promissory note made by the defendant for \$140, to recover the amount of it with interest, amounting in all to \$154.60. At the trial the plaintiff produced and proved the making of the promissory note. On his cross-examination it appeared that he had other dealings with the defendant and a Mrs. James, that he had an account in his books with them, that the amount of the note formed one of the items of this account, and that he had taken a mortgage from Mrs. James covering the amount of the account. Upon this appearing, the County Court judge stopped the case, holding that the Division Court had no jurisdiction; and the plaintiff then moved for the mandamus.

*Held*, that the plaintiff's claim came within the provisions of clause (d) of sub-s. 1, of s. 72, of the Division Courts Act, R.S.O. 1897, c. 60, as amended by 4 Edw. VII. c. 12, s. 1. He sued on the promissory note only, and to make out his case all that was necessary was the production of the note and proof of the signature of the defendant. The question whether the claim on it had become merged in the mortgage, if that question could or did

arise, was matter of defence, and the fact that the amount of the note formed one of the items of the account kept by the plaintiff with the defendant and Mrs. James, if of any importance at all, did not affect the question of jurisdiction. These were matters of defence, which the judge, having jurisdiction to try the action, had jurisdiction to pass upon.

*J. M. Ferguson*, for plaintiff. *Shirley Denison*, for defendant.

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Meredith, C.J.C.P., Britton, J., Clute, J.] [April 28.

McMURRAY v. EAST MISSOURI SCHOOL SEC. NO. 3.

*Public schools—Teacher's salary—Written agreement.*

Appeal by defendant from the judgment of the County Court of Oxford in favour of the plaintiff, the jury having found a general verdict for the plaintiff, assessing the damages at \$50, for which sum judgment was entered. It was not disputed that the plaintiff was engaged as a teacher for 1908, but the agreement was not reduced to writing. The defendants contended that this being so it was not binding on them. Sec. 81, sub-s. 1, of the Public Schools Act, 1 Edw. VII. c. 39, provides that: "All agreements between trustees and teachers shall be in writing, signed by the parties thereto, and shall be sealed with the seal of the corporation."

*Held*, that the case of *Birmingham v. Hungerford*, 19 C.P. 411, settles this question in favour of the defendants. That case was decided under 23 Vict. c. 49, s. 12. The present statute, 1 Edw. VII. c. 39, s. 81, sub-s. 1, is the same, with the exception that the words, "to be valid and binding," which were used in s. 12 have been dropped in subsequent consolidations, but the dropping of these words has not altered the effect of the provision. See *Young v. Corporation of Leamington*, 8 Q.B.D. 579, 8 App. Cas. 517. The conduct of the defendants having been unmeritorious the appeal was allowed without costs and the action dismissed without costs.

*C. A. Moss*, for defendants. *J. L. Ross*, for plaintiff.

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Divisional Court, K.B.]

[April 30.

NEWMAN *v.* GRAND TRUNK RY. CO.

*Railway—Carriage of goods—Condition of contract—Misprint.*

Appeal by plaintiff from the judgment of TEETZEL, J. (20 O.L.R. 25), dismissing the action without costs. Owing to an obvious mistake the word "or" appears instead of "are" in a clause of the terms and conditions printed on the back of the defendants' shipping bill. In this form it received the approval of the Board of Railway Commissioners for Canada, and the mistake was perpetuated in the forms used by the defendants. The action was for a declaration that the whole clause was thereby rendered insensible and meaningless.

*Held*, that the appeal must be dismissed as under the authorities the provision could not be reduced to a nullity by an obvious mistake.

*H. D. Smith*, for plaintiff. *W. E. Foster*, for defendants.

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Boyd, C.]

PIGGOTT *v.* FRENCH.

[May 2.

*Defamation—License inspector—Notice not to supply intoxicating liquor to plaintiff—Information by person not within the statute—Notice of action—Public officer exceeding jurisdiction.*

Action by plaintiff, a grocer in the town of Wallaceburgh, against the license inspector of the county of Kent to recover damages for the issue of a notice to the hotelkeepers of the county not to supply the plaintiff with intoxicating liquor. 6 Edw. VII. s. 33, provides as to what persons who may give the notice, or require the inspector to give the notice to vendors of liquor not to deliver liquor to the person having an inebriate habit. One McKnight, who did not come within the list of persons referred to in the above section, although a connection of the plaintiff's by marriage, required the defendant as inspector to give the notice. The inspector believing that McKnight came within the statute gave the notice.

*Held*, 1. Following *Connors v. Darling*, 23 U.C.R. 541, that the defendant was liable inasmuch as the statute afforded no protection, McKnight, who initiated the proceedings not coming within its terms, and who had no more authority to intervene than a stranger.

2. The inspector although a public officer was not entitled to notice of action under R.S.O. c. 88, ss. 1, 13-14. He was not acting in respect of the matter within his jurisdiction and was therefore acting "unlawfully." Good faith and honest intention cannot create an authority to act where the officer is outside the jurisdiction. See *Houlden v. Smith*, 14 Q.B. 841, *Sinden v. Brown*, 17 A.R. 187, *Roberts v. Climie*, 46 U.C.R. 264.

*G. S. Fraser*, K.C., for plaintiff. *Wilson*, K.C., and *Pike*, K.C., for defendant.

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Mulock, C.J. Ex.D.]

[May 5.

RE DALE AND TOWNSHIP OF BLANCHARD.

**Municipal corporations—Money by-law—Voting on—Voters' list—Assessment roll—Court of Revision—Proceedings out of time—Basis of list—Certificate of County Court judge—Finality of list—Qualifications of voters—Conduct of voting—Irrregularities—Motion to quash—Costs.**

Application to quash a money by-law of the township granting aid to St. Mary's and Western Ontario Railway Company.

MULOCK, C.J.:— . . . The voting on the by-law took place on the 19th November, 1909, 244 votes being given in its favour and 240 against it, thus resulting in a majority of 4 for the by-law.

The list used for the purposes of such voting was that certified by the County Court judge on the 6th November, 1909. The applicant contends that such was not the proper list, but that the voters' list of 1908 was the last revised and certified list, and therefore should have been used. . . .

The assessment roll for 1909 was returned to the clerk of the municipality on Saturday, the 29th April. Within the 14 days allowed by s. 65 of the Assessment Act, 4 Edw. VII. c. 23, in which to appeal, a considerable number of appeals against the roll were duly filed with the clerk. On the 18th May the Court of Revision met and tried the appeals, and the roll was purported to be finally revised and corrected in accordance with the decisions of the Court of Revision. The court, however, was not entitled to try these appeals until 10 days after the last day for appealing: s. 61 of the Assessment Act. Thus its action in disposing of the appeals in question on the 18th May was a nullity: *Re Dale and Township of Blanchard*, ante 65.

The clerk then prepared, on the basis of such revised and corrected roll, the alphabetical list of voters required by s. 6 of the Ontario Voters' Lists Act, 7 Edw. VII. c. 4, and adopted the various steps called for by that Act, with a view to the list being finally revised and certified to by the judge. No appeals were made against the list of voters thus prepared by the clerk, and the same was duly certified to by the judge on the 6th November, 1909. On these facts the applicant contends that, inasmuch as the Court of Revision had no legal right to sit on the 18th May and adjudicate in respect of the appeals from the assessment roll, it was not competent to the judge to revise and to certify to the voters' list.

It was the duty of the Court of Revision to try each of the appeals in question (s. 62 of the Assessment Act), and that before the 1st July, 1909 (sub-s. 20 of s. 65 of the Assessment Act). By sub-s. 1 of s. 68, an appeal to the County Court judge shall be at the instance of the municipal corporation, or at the instance of the assessor or assessment commissioner, or at the instance of any ratepayer of the municipality, not only against a decision of the Court of Revision on an appeal to the said court, but also against omission, neglect, or refusal of the said court to hear or decide an appeal. The court not having before the 1st July tried the appeals, it was competent, under this section, for any ratepayer to have appealed to the judge against such omission of duty. Whether the court omits to hold a legal meeting, or, holding a legal meeting, omits to try all complaints, as required by s. 62 of the Assessment Act, in either case an appeal lies to the judge; and, if no appeal is taken, sub-s. 16 of s. 6 of the Voters' Lists Act applies.

In this case no appeal having been taken because of the omission of the Court of Revision to sit within the time prescribed by the Assessment Act to dispose of appeals made to that body, or for any other reason, the assessment roll in question, because of the absence of any appeal, therefrom, became "deemed to be finally revised and corrected," and constituted a legal basis for the preparation of the voters' list of 1909, and, on its being certified to by the judge on the 6th November, 1909, it became the proper list to be used for the purpose of the voting on the by-law.

I am of opinion that the objection because of the list of 1909 having been used fails.

Another objection is, that "several persons voted upon the by-law who were not entitled so to vote." The persons in this objection referred to are those whose names appear on the last revised and certified voters' list, as entitled to vote, but who, the applicant contends, did not possess the qualification entitling them to have their names placed on the list.

It is not open to this court to deal with this class of objection. By s. 24 of the Voters' Lists Act, "the certified list shall . . . be final . . ." See *In re Mitchell and Campbellford*, 16 O.L.R. 578. I therefore am of opinion that it is not competent to the applicant to call in question the findings of the County Court judge as to the qualifications of the persons whose names he has placed upon the voters' list. This objection, therefore, fails.

*C. C. Robinson*, for the applicant. *Fullerton*, K.C., for the township corporation.

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## Province of Nova Scotia.

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### SUPREME COURT.

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Full Court.]

[April 9.

*McISAAC v. FRASER MACHINE AND MOTOR Co.*

*Sale by agent—Contract in excess of authority—Ratification.*

Defendant company, builders of gasoline engines, employed an agent, L., to solicit orders for them and furnished him with contract blanks to be filled up where sales were effected, containing a description of the engine ordered, the terms of payment, etc., and a guaranty on the part of the company that the engine was built of first-class material, of full rated horse power, thoroughly tested, etc., and agreeing to repair or replace defective parts within one year from date of invoice. It appeared from the evidence that the company, while not builders of boats, occasionally contracted to deliver boats as well as engines, and that in such cases they arranged for the construction of the boat required with builders in other places. L. took an order from plaintiff for the delivery of one of defendant company's 11 horse power engines and (at an additional cost) a boat suitable for the carriage of a specified number of passengers, and trans-

mitted the same to defendant who wrote plaintiff saying: "We have your order for an 11 horse power (engine) and boat to our Mr. Paul J. Lidbach. We will take up the matter of the boat at once and trust we may be able to serve you in a satisfactory manner and thanking you for your order, etc."

*Held*, that there was no holding out by the company of L. as their agent to take such orders as that given by plaintiff and that the letter acknowledging receipt of the order was not such a ratification as to make it binding upon defendant.

Per DRYSDALE, J., dissenting:—It was the duty of defendant, as soon as the sale was reported, to have promptly repudiated their agent's authority, and that their action after receipt of notice of the contract amounted to a ratification.

*R. G. MacKay*, in support of appeal. *O'Connor*, K.C., contra.

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Full Court.]

[April 9.

**GASS v. ALFRED DICKIE LUMBER CO.**

*Statute of Frauds—Defence to action claiming specific performance—Findings of trial judge—Acts insufficient to take case out of statute.*

Plaintiff being indebted to defendants in a large sum of money secured by a judgment and in other ways arranged a compromise by which defendants agreed to release their judgment and other securities on payment of a much smaller sum, for which plaintiff gave his promissory note, payable in three months. On maturity of the note plaintiff was unable to meet it and claimed that a further agreement was made by which defendants agreed to advance a further sum of money to pay off certain encumbrances, and to surrender plaintiff's note on receiving a transfer of certain properties enumerated. In an action claiming specific performance plaintiff alleged that a part payment was made by defendants on account of the further advance agreed to be made by them, and that plaintiff prepared the deeds necessary to carry out the agreement on his part and that one of such deeds was delivered to and accepted by defendants. The trial judge found in favour of the making of the agreement as alleged by plaintiff, but that the deed referred to was delivered and accepted for another purpose.

*Held*, that the payment of a portion of the sum agreed to be advanced by defendants could not be treated as a part per-

formance to take the case out of the Statute of Frauds, and that the delivery of the deed under the circumstances found could not be accepted as fulfilling the requirements of the statute.

*Christie*, K.C., in support of appeal. *O'Connor*, K.C., contra.

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Full Court.]      IN RE SYDNEY G. PIERS.      [April 9.

*Collection Act—Consent order made in absence of debtor—Jurisdiction of Commissioner—Estoppel.*

Where a debtor in order to avoid an examination before a Commissioner, under the Collection Act, touching his ability to pay a debt for which judgment had been recovered against him, gave his consent in writing to the making of an order against him for the payment of the debt by instalments and admitting possession of means to pay the instalments agreed upon.

*Held*, that he would not be permitted subsequently to take advantage of the fact that he was not present personally or by counsel when the order so assented to was made by the Commissioner.

*GRAHAM*, E.J., dissented, on the ground that the written consent, in the absence of the debtor personally or by counsel, was not sufficient to give jurisdiction.

*Terrell*, support of appeal. *King*, K.C., contra.

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Full Court.]      REDDY v. STROPLE.      [April 9.

*Trespass to land—Construction of deeds—Equivocal statement—Latent ambiguity—Admission—Word “crossway.”*

The description in defendant's deed purported to run along the public highway until it came to a "crossway" and thence in a southerly direction, etc. It appeared that a "crossway" was a kind of wooden culvert or bridge and that at or near the point in question there were two crossways, and that if the line of departure was taken from the first one it would cross property of a third person.

*Held*, that the word "crossway" as used being an equivocal statement, the one should be taken that would suit the other parts of the description.

In cases of latent ambiguity, it is possible to look at the evidence as to the state of things.

The description in the earlier deed having been departed from, apparently deliberately, there was no authority for going back to it.

In construing the deed, where there was nothing to indicate a mistake of any kind, there was no authority for striking out a monument like a crossway and substituting another object.

A line fence which had existed for a period of 23 years on one side of a brook where the second crossway was situated could be regarded as an admission of the correctness of that place as the point of departure.

TOWNSHEND, C.J., and DRYSDALE, J., dissented as to the application of the descriptions.

*Gregory*, K.C., and *Floyd*, in support of appeal. *J. A.*  
*Fulton*, contra.

Drysdale, J.] REX v. MORRIS. [May 9.

**Canada Temperance Act**—R.S.N.S. c. 71, s. 115(2), construction  
—Deputy stipendiary magistrate—Jurisdiction—Excessive  
costs—Habeas corpus—Criminal Code, 1120.

The defendant was convicted by a deputy stipendiary magistrate of the town of Westville in the county of Pictou, acting at the request of the stipendiary magistrate of an offence against Part II. of the Canada Temperance Act and fined \$50 and costs, and in default of payment imprisonment for one month unless fine and costs were sooner paid. On motion to discharge him on the return to a habeas corpus on the grounds (1) that two hearings of \$1 each were taxed against the prisoner in contravention of s. 770 of Crim. Code, and (2) that the deputy of the stipendiary magistrate could only act in the event of the temporary absence or incapacity through illness, etc., of the stipendiary.

*Held*, 1. Assuming that excessive costs were included in the conviction as there was a good sentence, the prisoner should not be discharged on that ground, but that a new conviction and commitment could be directed to be drawn up or the present one amended by reducing the costs so as to conform to the law.

2. Sec. 115 of the Towns' Incorporation Act, R.S.N.S. c. 71, s. 115(2), is one conferring jurisdiction, the latter part of it does not enlarge the obvious and apparent limitation in the first part, which very plainly indicates that a deputy stipendiary magistrate is given power only to perform the duties of the stipendiary in

the event of his temporary absence or incapacity, etc., and as the former officer acted in this case in fact and as appeared by the proceedings on their face, on the mere request of the latter and permanent official, the conviction was without jurisdiction and the prisoner must be discharged.

3. Sec. 1120 of Crim. Code only applies to indictable offences and where the acting officer has jurisdiction.

*Power*, K.C., for the prisoner. *O'Connor*, K.C., for the prosecutor.

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Graham, E.J., Trial.]

[May 12.

DE HART v. McDIARMID.

*Vendor and purchaser—Terms of purchase—Discharge of incumbrance—Interest—Word “due”—Admission—Costs.*

Plaintiff purchased a property from defendant subject to a mortgage held by the Yarmouth Building Society. By the terms of purchase, the purchase money was to be paid in instalments to the agent of the Society, C. (who was joined as a defendant), and was to be applied by him, in part, in payment of the mortgage. It was provided: "The rate of interest chargeable by the parties concerned on the balance of this purchase price, which may from time to time be due, shall be 7% per annum." It was contended by defendant that there was to be an ordinary interest account on the purchase price adding interest and deducting instalments as they were paid, and plaintiff at the end of the second year signed a statement with the interest made up on its face according to defendant's contention.

*Held*, that the word "due" was used in the sense of "owing" or "unpaid"; and that the paper signed by plaintiff was in the nature of an admission, and that he must pay the charge which he had to pay the Society in order to secure the release of the mortgage, without recourse against either defendant.

*F. McDonald*, for plaintiff. *H. Ross*, for defendants.

## Province of Manitoba.

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### COURT OF APPEAL.

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**Full Court.]**      **COLWELL v. NEUFELD.**      [April 11.

*Vendor and purchaser—Agreement of sale of land—Bond to secure payment of purchase money with additional stipulation for payment even though obligees should be unable to make title to the land.*

Defendants with others had entered into an agreement with the plaintiffs that they would respectively purchase certain lands at a price agreed on, \$2 per acre of which was to be paid on 1st Nov., 1905. Defendants afterwards executed the bond sued on in this action. This bond stated that it was given expressly to secure the said payment of \$2 per acre, but it contained an additional stipulation for the payment to the plaintiffs of \$2,500, part of the instalment of \$2 per acre to and for their own use and benefit, as liquidated damages for their services rendered and to be rendered in using every possible endeavour to have the lands surveyed and located as soon as possible, and that such services should be a sufficient performance of the agreement on their part. In the opinion of the court, the plaintiffs failed to shew at the hearing that they had ever acquired title to the lands or any legal or enforceable right to purchase them.

*Held,* that, as the plaintiffs could not recover under the agreement, neither could they on the bond, which should be construed as one merely given, as it said, to secure the instalment of purchase money, disregarding the stipulation above referred to as being fraudulent as against the defendants.

*Dennistoun, K.C., and Robson, K.C., for plaintiffs. Wilson, K.C., and McLeod, for defendants.*

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**Full Court.]**      **RENTON v. GALLAGHER.**      [April 11.

*Malicious prosecution—Want of reasonable and probable cause—Burden of proof—Honest belief—Province of judge and jury—Questions to jury—Malice—Reasonable care in ascertaining facts—Search warrant.*

*Held,* 1. Although a prosecutor, before commencing the prosecution of a person whom he suspects to be guilty of a crime, must,

to protect himself from a subsequent action for damages for malicious prosecution, take reasonable care to acquaint himself with the facts, such reasonable care does not necessarily include making inquiries of the suspected person himself or asking him for an explanation especially when the prosecutor's solicitor advises him to refrain from doing so. *Archibald v. McLaren*, 21 S.C.R., per PATERSON, J., at p. 603, and *Malcolm v. Perth*, 21 O.R. 406, followed.

2. The question of reasonable and probable cause being for the judge, and not for the jury, to decide, after obtaining the opinion of the jury, when necessary, upon any facts in dispute upon which such question depends, it is not a safe or proper course to submit to the jury the question: "Did the defendants take reasonable care to inform themselves of the true facts of this case" as this is practically equivalent to asking the jury if the defendants had reasonable and probable cause for laying the information, which is a question solely for the judge and really involves a conclusion of law. Opinion of CAVE, J., in *Brown v. Hawkes* (1891), 2 Q.B. 718, followed.

3. Malice cannot be inferred from the fact that the defendant, in giving evidence at the trial, stated that he still believed in the guilt of the plaintiff.

4. The absence of reasonable and probable cause for the prosecution is not of itself evidence of malice, but only in cases where the conduct of the prosecutor, in instituting the prosecution, is shewn to have been so unreasonable as to lead to the inference that the prosecution could only have been the result of malice. *Brown v. Hawkes*, *supra*, followed.

5. A finding of the jury that the defendants had been actuated by some motive other than an honest desire to bring a guilty man to justice, if unsupported by the evidence, will be disregarded.

6. If the prosecutor has had a search warrant issued and executed in order to obtain evidence in support of his charge, the plaintiff, in a subsequent action for malicious prosecution, would have a right to have that considered in aggravation of damages in the event of his getting a verdict in the action; but, if he fails, he can have no separate cause of action based on the issue or execution of the search warrant.

7. If the jury does not answer the question as to the defendant's honest belief in the case which they laid before the magistrate, and the plaintiff in the opinion of the court has failed to

satisfy the onus upon him of proving want of reasonable and probable cause and malice, a verdict entered for him at the trial should be set aside, notwithstanding the findings of the jury, unsupported by the evidence, that the defendants had not taken reasonable care to inform themselves of the true facts of the case and had been actuated by some improper motive, and a non-suit should be entered, pursuant to rule 651 of the K.B. Act as re-enacted by 10 Edw. VII. c. 17, s. 7, in the absence of any mention of fresh evidence to warrant the ordering of a new trial.

*Trueman*, for plaintiff. *Phillips* and *Chandler*, for defendant.

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Full Court.]

[April 14.

BANK OF NOVA SCOTIA *v.* BOOTH.

*Private International law—County—Assets of foreign insolvent—Receiver by foreign court—Service of statement of claim outside jurisdiction.*

Appeal from judgment of MACDONALD, J., noted vol. 45, p. 251, dismissed with costs.

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Full Court.]

KERFOOT *v.* YEO.

[April 25.

*Security for costs—Jurisdiction of judge of the King's Bench to order security for costs of appeal to Court of Appeal—Order for security for costs already taxed and for which judgment entered.*

*Held*, 1. Neither a judge of the King's Bench nor a judge of a County Court has jurisdiction to order a non-resident plaintiff to give security to the defendant for the costs of an appeal to the Court of Appeal, or to stay proceedings in the Court of Appeal after the action has got into that court, but the Court of Appeal will itself in a proper case order security for the costs of the appeal on the application of the defendant. *Bentsen v. Taylor* (1892), 2 Q.B. 193, not followed.

2. When the plaintiff's action has been dismissed and the defendant has entered judgment for his taxed costs, no order will be made requiring the plaintiff prosecuting an appeal to give security for them, although he is a non-resident and the security he has already given under an order made by the court of first instance is insufficient to cover the taxed costs.

*Fullerton*, for plaintiff. *Bergman*, for defendants.

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KING'S BENCH.

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Metcalf, J.]      *SHAW v. CITY OF WINNIPEG.*      [May 3.

*Practice—Discovery—Officer of corporation—King's Bench Act, Rule 387.*

In an action against a city corporation for damages occasioned by the negligence of an employee of the water works department of the city in discharging his duty of examining a water meter in the plaintiff's premises, the plaintiff has a right, under Rule 387 of the King's Bench Act, to examine for discovery a water meter inspector of the city as an officer of the corporation. *Dixon v. Winnipeg Electric Railway Co.*, 10 M.R. 660, followed.

*Dennistoun, K.C., and Young*, for plaintiff. *T. A. Hunt*, for defendants.

Richards, J.A.]      [April 7.

*WHITE v. CANADIAN NORTHERN Ry. Co.*

*Negligence—Common employment—Liability of employer for injury to workman caused by negligence of foreman—Workmen's Compensation for Injuries Act—Duty of persons who cause others to handle specially dangerous things.*

The death of the deceased was caused by carelessness and ignorance in the handling of dynamite by the deceased and a fellow workman named Anderson employed by the road-master of defendants to look after the work. According to the answers of the jury, Anderson was not a competent person to be so employed, and the road-master was aware that he was not and there was, in the opinion of the judge, evidence sufficient to warrant the findings of the jury.

*Held*, 1. The plaintiffs could not recover under Lord Campbell's Act because the road-master was a fellow workman with the deceased.

2. The plaintiffs were entitled to recover \$1,500 in all under the Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 178, because, by the jury's findings, the death was caused by reason of the negligence of a person in the service of the employer who had superintendence entrusted to him whilst in the exercise of such superintendence: par. (b) of s. 3.

*Dominion Natural Gas Co. v. Collins*, 79 L.J.P.C., p. 16, followed, as to the duty of those who cause others to handle specially dangerous things.

*Deacon and Kemp*, for plaintiffs. *Clark, K.C.*, for defendants.

## Proclamations.

*(Canada Gazette, May 9, 1910.)*

**GREY.**

**CANADA.**

By His Excellency the Right Honourable **SIR ALBERT HENRY GEORGE, EARL GREY**, Viscount Howick, Baron Grey of Howick, in the County of Northumberland in the Peerage of the United Kingdom, and a Baronet; Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Knight Grand Cross of the Royal Victorian Order, etc., etc., Governor-General of Canada.

To all to whom these presents shall come,—**GREETING:**

WHEREAS it hath pleased Almighty God to call to His Mercy Our late Sovereign Lord King Edward the Seventh of blessed and glorious memory by whose decease the Imperial Crown of the United Kingdom of Great Britain and Ireland and all other His late Majesty's Dominions is solely and rightfully come to the High and Mighty Prince George Frederick Ernest Albert, Now Know Ye that I, the said Sir Albert Henry George, Earl Grey, Governor-General of Canada as aforesaid, assisted by His Majesty's Privy Council for Canada, do now hereby with one full voice and consent of tongue and heart publish and proclaim that the High and Mighty Prince George Frederick Ernest Albert is now by the death of our late Sovereign of happy and glorious memory become our only lawful and rightful Liege Lord George the Fifth by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India, Supreme Lord in and over the Dominion of Canada, to whom we acknowledge all faith and constant obedience with all hearty and humble affection, beseeching God by whom all Kings and Queens do reign to bless the Royal Prince George the Fifth with long and happy years to reign over us.

Given under my Hand and Seal at Ottawa this ninth day of May, in the year of Our Lord one thousand nine hundred and ten, and in the first year of His Majesty's reign.

By Command,

**CHARLES MURPHY,  
Secretary of State.**

GOD SAVE THE KING.

CANADA.

**GEORGE THE FIFTH**, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

To all to whom these presents shall come,—GREETING:

CHARLES MURPHY,  
Acting Attorney-General  
Canada.

{ WHEREAS by chapter one  
hundred and one of the  
Revised Statutes of Canada,

1906, intituled "An Act respecting the Demise of the Crown," it is, amongst other things, in effect enacted, that upon the demise of the Crown, it shall not be necessary to renew any commission by virtue whereof any officer of Canada, or any functionary in Canada or any Judge of the Dominion or Provincial Courts in Canada, held his office or profession during the previous reign; but that a proclamation shall be issued by the Governor-General authorizing all persons in office as officers of Canada who held commissions under the late Sovereign, and all functionaries who exercised any profession by virtue of any such commissions and all Judges of Dominion and Provincial Courts to continue in the due exercise of their respective duties, functions and professions; and that such proclamation shall suffice and that the incumbents shall, as soon thereafter as possible, take the usual and customary oath of allegiance before the proper officer or officers thereunto appointed.—

Now, therefore, by and with the advice of Our Privy Council for Canada, We do, by this Our Proclamation, authorize all persons in office as officers of Canada and all functionaries in Canada, and all Judges of the Dominion and Provincial Courts in Canada, who, at the time of the demise of Our late Royal Father of glorious memory, were duly and lawfully holding or were duly and lawfully possessed of or invested in any office, place or employment, civil or military, within Our Dominion of Canada, or who held commissions under the late Sovereign, or all functionaries who exercised any profession by virtue of any such commissions, to severally continue in the due exercise of their respective duties, functions and professions, for which this Our Proclamation shall be sufficient warrant.

And We do ordain that all incumbents of such offices and functions and all persons holding commissions as aforesaid shall,

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as soon hereafter as possible, take the usual and customary oath of allegiance to Us before the proper officer or officers hereunto appointed.

And We do hereby require and command all Our loving subjects to be aiding, helping and assisting all such officers of Canada and other functionaries in the performance of their respective offices and places.

IN TESTIMONY WHEREOF, We have caused these Our Letters to be made Patent, and the Great Seal of Canada to be hereunto affixed. WITNESS Our Right Trusty and Right Well-Beloved Cousin the Right Honourable SIR ALBERT HENRY GEORGE, EARL GREY, Viscount Howick, Baron Grey of Howick, in the County of Northumberland, in the Peerage of the United Kingdom, and a Baronet; Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, etc., etc., etc., Governor-General of Canada.

At Our Government House, in Our City of Ottawa, this ninth day of May, in the year of Our Lord one thousand nine hundred and ten, and in the first year of Our Reign.

By Command,

CHARLES MURPHY,  
Secretary of State.

GOD SAVE THE KING.

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A subsequent proclamation announces that Friday, May 20th, has been fixed "for the obsequies of His late Majesty, our Royal Father of blessed and glorious memory," and it appoints and sets apart that day as a day of general mourning to be observed by all persons throughout the Dominion of Canada.

# Canada Law Journal.

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## *MR. JUSTICE OSLER'S JUDICIAL FAREWELL.*

Those who were present in the Court of Appeal on the morning of the 18th April, when Mr. Justice Osler made his final appearance as a member of the court in which he had been a familiar figure for so many years, must have felt that the occasion was a very memorable one. It has been already referred to in the LAW JOURNAL, but we feel sure that our readers will agree with us in thinking that further reference may well be made to an event so interesting to the profession and the public.

Unusual indeed was the scene which the court room presented to those whose duties call them from time to time to form part of that audience. Every seat was occupied and every corner of the room crowded with those who had not been able to secure those positions of advantage, to which the holders clung with even more than the proverbial lawyer's tenacity! Within the Bar, and outside of it, was an imposing array of King's counsel, for once assembled not that they might rise to the height of some "great argument" but for the purpose of shewing their esteem and affection for one who more than thirty years ago doffed his stuff gown for the judge's robes, which during all those years he has worn with honour to himself and to the great advantage of his profession and the country. It may be noted in passing that the strange omission of Mr. Osler's name from the list of those who have been chosen to "take silk," to which attention was called in our columns more than thirty years ago, has only been rectified within the last few weeks, since his retirement from the Bench.

Returning, however, to the matter in hand, with which the difference between stuff and silk, however important it may be in some respects, has but little to do, it may be said that the address of Sir *Æ*milious Irving from which an extract has already been given in our columns, was felt by all who were present

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to be a worthy expression of the sentiments of those on whose behalf he spoke. Reference was made by him to the fact that the Attorney-General, who was prevented by serious indisposition from being present and taking part, as he would so gladly have done, in the proceedings of the day, had requested him to speak on his behalf. It may be added that the venerable Treasurer of the Law Society, with other members of convocation, who had assembled at a special meeting of that body, came directly from that meeting, which had been adjourned for the purpose, to the Court of Appeal, and that he was also requested by the York County Law Association and the Ontario Bar Association, to act as their spokesman on the occasion. In feeling and appropriate terms, Sir *Æ*Emilius spoke of the desire of all those whom he represented to testify their loyalty and affection to one who was regarded by them not only as an illustrious member of the Bench, but as a friend whose familiar presence was highly valued, and whose withdrawal from amongst them would give everyone a sense of personal loss. In concluding his remarks, the treasurer stated that he was "directed by the Corporation of the Law Society and the Benchers in congregation to communicate (to the learned judge) that they hail with gratification the prospect of his taking his place as of right in their governing body, and that his accession thereto will be of great benefit to the province generally and to the profession." All who were present rose to their feet when Chief Justice Sir Charles Moss, on behalf of himself and his colleagues on the Bench, expressed his desire that they "should be associated in the most emphatic manner" with everything that had been said by the Treasurer, but that no words could adequately express their own sense of loss alike to the Bench, the Bar, and the public, and of personal loss to themselves occasioned by the retirement of their brother Osler." Then came the moment of chief interest in what was throughout a most impressive and memorable scene, when Mr. Justice Osler rose, and only controlling his manifest deep emotion by a strong effort, addressed the court and the members of the Bar in a few characteristically simple and modest words, in which

he expressed his high appreciation of the honour which had been done him, and of his gratification in feeling that he was leaving the Bench after his thirty-one years' service, not in the "cold silence of the most critical profession in the world," but with such a cordial expression of their approval. It was a moment of almost painful interest, when the judge, closing his brief address with a characteristic reference to his desire not to trespass unduly upon the time which belonged to the country, passed behind the chairs of his brethren on the Bench, and after receiving a kindly greeting from that other well-tried judicial veteran, the Chancellor, who was present as *amicus curiae*, retired for the last time from the place that knew him so well.

Mr. Justice Garrow then moved to the vacant chair at the right hand of the Chief Justice, and Mr. Justice Magee was sworn in as "justice of appeal in the room and stead" of the retiring judge. Some case was then called, and the wheels of justice began again to revolve.

The memory of the scene, however, will linger long with those who were present, and it will not be out of place to offer a few reflections on the causes which have led to such a remarkable expression of the feeling of the Bar towards Mr. Justice Osler, a feeling, it should be added, which is shared by the public at large, and by the press which, no doubt, was a faithful mirror of the views of those to whom it speaks, when it headlined its report of the proceedings of which we have given an outline as the "farewell of a great judge." The proofs of this are to be found, not alone in that great body of careful and well-considered judgments which have been penned by him during these thirty laborious years, so many of which are found in the pages of our reports, and will, no doubt, be cited as leading authorities or helpful discussions for many a year to come, but also in considerations of a more general nature, which are well summarized in two apt quotations with which Mr. Justice Garrow enriched the genial and suggestive address delivered by him at a recent meeting of the Ontario Bar Association. One was from Socrates through the medium of his great interpreter Plato, and was to the following effect: "Four things belong to

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a judge, to hear courteously, to answer wisely, to consider soberly, and to decide impartially." The other quotation was from the great Bacon, who unfortunately was not in all things an exemplar of the judicial virtues of which he speaks as follows: "Judges ought to be more learned than witty, more reverent than plausible and more advised than confident. Above all things integrity is their portion and proper virtue." We fully agree with Mr. Justice Garrow, when he goes on to say that "the Bench of Ontario, as a whole, both past and present, would fairly measure up to even these high standards," but it will be generally admitted that if an individual case is sought, in which these standards have been fully exemplified, such a case is furnished in the career of Mr. Justice Osler. From that career he has seen fit to retire while still in the full enjoyment of his bodily and mental powers, while, to use the feeling words of Sir *Æmilius Irving*, "he is surrounded with joys, he has around him honour, love, obedience, the affection of his children and troops of friends." It is pleasant to know that since his retirement he has been chosen to fill a position of high trust and responsibility in which no one can doubt that he will discharge the duties that fall to his lot with that thoroughness and fidelity which have ever been his leading characteristics. Of him it may surely be said, as of another who consistently followed the path of duty:—

"Whatever record leap to light,  
He never shall be shamed."

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#### THE CANADIAN CONSTITUTION.

Our excellent contemporary, the *Law Notes*, in a very intelligent article discusses the "Canadian Constitution," especially with reference to the difference between it and that of the United States, drawing attention to some similarities and some differences. The writer refers to the case of *Bank of Toronto v. Lambe*, 12 A.C. 588, as to there being, under the British North America Act, no residuum of power vested directly in the people. That

Act exhausts the whole range of legislation, so that whatever is not thereby given to the provincial legislatures rests with the Parliament of the Dominion. With reference to the distribution of legislative powers between a Provincial Legislature and the Federal Parliament the writer says: "The Canadian statesmen who discussed the terms of the proposed Confederation in the early sixties were close observers of the great struggle then being waged between the north and the south. Believing that the war was the result of the failure of the United States constitution to give to the Federal Government sufficient control over the States, they resolved to establish a strong central authority in the new Confederation. The British North America Act endowed the Federal Parliament with the right to legislate on all subjects not expressly reserved to the provinces. It also gave to the Federal Government the power of vetoing any Act of a Provincial Legislature. In recent years, however, the idea has been favoured that the Federal Government should not veto a provincial Act when such Act is clearly within the sphere of legislation reserved to the province. Under this principle the Federal Government has lately refused to disallow the Ontario Hydro-Electric Power legislation."

It is gradually becoming evident to intelligent observers that this principle, commonly called the doctrine of provincial rights, has seriously impaired the balance between Federal and Provincial powers and destroyed the safeguards against hasty, unrighteous or improvident legislation which the power of disallowance given under the British North America Act was intended to create; and has rendered the section a nullity for the purposes for which it was enacted. It was, in the opinion of the framers of our constitution, a wise and necessary provision, and especially so in provinces where there is no second chamber. The present interpretation of the section confines the power of disallowance to cases where there is a manifest encroachment by a Provincial Legislature upon the jurisdiction of the Dominion Parliament. It is manifest that such a power was unnecessary for such a purpose, and therefore it was not intended for that, but for something else. The Governor-General, to whom the right of dis-

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allowance is given, has through his advisers, abrogated his rights under the section in question, and has refused to shoulder the responsibility thereby laid upon him. This subject has already been discussed in our pages, but it would not be inappropriate here to reproduce what has already been said on this point. Mr. Labatt in his article on disallowance (*ante vol.*<sup>45</sup>, p. 300), says: "The more reasonable hypothesis would seem to be, that the framers of the Act regarded questions of jurisdiction as being preferably determined by decisions rendered in the ordinary course of litigation, and that it was their expectation that the validity of legislation in this particular point of view would normally be settled by the courts rather than by the Dominion authorities. This consideration may fairly be said to indicate that the special object of the section as to disallowance was to render possible the annulment of statutes which, although dealing with matters within the legislative domain of the Provincial Parliament, might be objectionable on other grounds." The subject is a most important one and must some day be dealt with in a statesmanlike manner, free from the pernicious entanglements of party politics.

From other observations in the article it is evident that the recent extraordinary legislation in the Province of Ontario referred to by the writer is becoming a subject of comment in other countries besides our own. He emphasizes his view of the defects of our system when he recites that the Canadians believed that substantial benefits were to be gained by leaving their legislatures unshackled, and relied upon public opinion and sound traditions of legislative action to prevent the passage of unjust laws, and continues: "It must be admitted, however, that a repetition of the recent high-handed legislation in the Province of Ontario in relation to the Hydro-Electric Power Commission and certain mining claims at Cobalt would likely shake their trust in the sufficiency of such safeguards." He adds, "It is interesting to note that because of the lack of restrictions on legislation, constitutional questions are, in comparison with their frequency in the United States, rarely raised in ordinary litigation, and constitutional law can scarcely be regarded as a bread-and-butter subject by the young practitioner."

*ACTUAL POSSESSION.*

That the popular definition of words and the legal meaning attributed thereto are frequently at variance cannot be gainsaid. And "possession" affords a specially notable instance of this peculiarity. To any person unhampered by consideration of the multifarious reported decisions which deal with that word, and who has not mastered their intricacies, the meaning it imports is a physical holding, and nothing less. It conveys, indeed, to the mind of such a one the notion contemplated when he employs the familiarly current phrase, "Possession is nine points of the law." But to the lawyer acquainted with those decisions, "possession" has a technical meaning of a particular nature. As was remarked by Mr. Justice Stirling (as he then was) in the case of *Re Egan; Mills v. Penton*, 80 L.T. Rep. 153; (1899) 1 Ch. 688, although lawyers may know the difference between an interest which is in possession and one which is in reversion, laymen do not use the word with reference to that distinction. His Lordship referred to the definition in Johnson's and other dictionaries—that is to say, the state of owning, or having in one's hands or power, property; adding that the fine distinction between "possession" and "ownership" is not one which would be present to the mind of an ordinary layman.

The definition, on the other hand, contained in the ancient law lexicon known as *Termes de la Ley* runs thus: "'Possession' is said two waies, either actuall possession, or possession in Law. 'Actuall Possession' is when a man entreth in deed into lands or tenements to him descended, or otherwise. 'Possession in Law' is when lands or tenements are descended to a man, and hee hath not as yet really, actually, and in deed entred into them: And it is called Possession in Law because that in the eye and consideration of the law, he is deemed to be in possession, forasmuch as he is tenaunt to every man's action that will sue concerning the same lands or tenements.'" But, as Mr. Stroud points out in his inimitable *Judicial Dictionary* (2nd edit., p. 1513), after quoting the foregoing definition, generally where an estate or interest in realty is spoken of as being "in possession," that does not, primarily, mean the actual occupation of the pro-

perty; but means the present right thereto or to the enjoyment thereof (*Ren v. Bulkeley*, 1 Doug. 292), as distinguished from reversion, remainder, or expectancy, as illustrated by the old conveyancing phrase, "In possession, reversion, remainder, or expectancy." The learned author cites the case, which came before Mr. Justice North, of *Re Morgan's Estate*, 48 L.T. Rep. 964; 24 Ch. Div. 114, where his Lordship expressed the opinion that the words "in possession" in s. 58, sub-s. 1, of the Settled Land Act, 1882, 45 & 56 Vict. c. 38, clearly mean possession properly so called as distinguished from possession in remainder or reversion.

Whether by prefixing the word "actual" to "possession" any force or intensity is added to the meaning of that word is seemingly a matter of some uncertainty. It is noticeably a word much favoured by the legislature, appearing as it does in innumerable Acts of Parliament. And the manifest object of adopting it is to fortify and give emphasis to the expression to which it is prefixed. It is true that in the case of *Gladstone v. Padwick*, 25 L.T. Rep. 96; L. Rep. 6 Ex. 203, Baron Bramwell, speaking of the words "actual seizure" in s. 1 of the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, observed that the word "actual" is of no peculiar force, and that "actual seizure" means no more than "seizure." Singularly, in regard to "occupation," which is required by s. 18 of the Representation of the People Act, 1832, 2 Will. 4, c. 45. It was laid down in *Reg. v. West Riding Justices*, 2 Q.B. 505, that "occupation"—even "actual occupation"—does not, necessarily, mean residence, although, as was admitted by Mr. Justice Patteson in that case, "ninety-nine persons in one hundred would so understand it." But that "actual," when expressly used in statutes and legal instruments, is usually designed to accentuate the meaning of any words to which it is prefixed is scarcely open to question. For example, inasmuch as the statute 1 Will. IV. c. 18, requires in terms that a house or building or land shall be "actually occupied" for the purpose of a person acquiring a settlement in a parish, it was held in *Rex v. Inhabitants of St. Nicholas, Rochester*, 5 B. & Ad. 219, that a constructive occupation would not satisfy the statutory requirement.

Whether "actual possession" means something more than "possession" standing alone, is, however, by no means so free from doubt. Does it mean possession *de facto*—that is to say, physical possession as distinguished from possession in law; or does it mean possession *de jure*—that is to say, mere constructive legal possession, as that of one who has an estate in *præsentि* and not in reversion, remainder, or expectancy? According to the statement in Vaizey on Settlements (p. 1349), it is in order to avoid tenants in tail in remainder being treated as persons entitled to the possession of estates, so as to entitle them to personality, that it has grown customary to prefix the word "actual" to "possession" in settlements of real estate. In some of the decided cases it has evidently been considered that "actual possession" has a somewhat more extended meaning than "possession" by itself. Thus, in *New Trinidad Lake Asphalt Company v. Attorney-General for Trinidad*, 91 L.T. Rep. 208; (1904) A.C. 415, the meaning of "actual possession" was attributed by the Privy Council to the word "possession" in contradistinction to control or right to control. So, also in *Leslie v. Earl of Rothes*, 71 L.T. Rep. 134; (1894) 2 Ch. 499, the suggestion that "possession" was used in contradistinction to reversion was rejected, and it was construed as "actual possession." And both words appearing in s. 26 of the Representation of the People Act, 1832, they were decided in *Murray v. Thorniley*, 2 C.B. 217, to mean possession in fact in contradistinction to possession in law. That decision was followed in *Hayden v. Twerton*, 4 C.B. 1, and likewise in *Webster v. Overseers of Ashton-under-Lyne; Orme's Case*, 27 L.T. Rep. 652; L. Rep. 8 C.P. 281.

There was a full discussion of the effect of prefixing the word "actual" in the arguments in the case of *Lord Scarsdale v. Curzon*, 1 J. & H. '40, at p. 66. It was there held by Vice-Chancellor Page-Wood that the expression "actual freehold" must be construed as a technical term equivalent to and signifying "freehold in possession": (See Co. Litt., Harg., 15a, 266b, note.) Accordingly, it was decided that the person entitled to the "actual freehold" of an estate was the person in possession or in the receipt of the rents and profits. That decision was con-

sidered by Mr. Justice Kekewich in the case of *Re Angerstein; Angerstein v. Angerstein*, 73 L.T. Rep. 500; (1895) 2 Ch. 883. The expression there was "actual possession"; and the learned judge was of opinion that "actual" did make a very large and important difference when prefixed to "possession"; and that the two phrases "entitled to the actual freehold" and "entitled to the actual possession" meant the same thing—that is to say, referred to the person in possession of the estate to which the phrase applied.

In this state of the authorities, and the divergence of judicial opinion which they disclose, what Mr. Justice Joyce had to consider in the recent case of *Re Lord Petre's Settlement; Leigh v. Petre*, 101 L.T. Rep. 847, was whether the fact that a tenant for life had previously assigned his life estate prevented him from becoming entitled to the "actual possession" of the settled estates under the limitations of the settlement there. Briefly stated, the facts in that case were as follows: By his marriage settlement Philip Petre was empowered, in case he should become entitled to the "actual possession" or the "actual receipt" of the rents and profits of the Petre estates under the limitations of a settlement, which was described as the Petre settlement, to revoke certain trusts contained in the marriage settlement. Philip assigned for valuable consideration the life estate to which he was entitled in remainder after Bernard and his issue under the Petre settlement to Bernard, the then tenant for life. On the death of Bernard without issue, Philip became entitled to the Petre estates, subject to the assignment by him. Later, Philip revoked the trusts of the marriage settlement. Mr. Justice Joyce came to the conclusion that "actual possession" did not mean physical possession, but possession under the terms of the settlement itself. Therefore his Lordship held that the assignment by Philip of his life estate to Bernard did not prevent the former, on the death of the latter, from becoming entitled to the actual possession of the Petre estates "under the limitations of" the Petre settlement; and that his power of revocation had consequently arisen and was effectually exercised.

In the course of his judgment the learned judge allowed

that, in ordinary language, Philip did not become entitled to the possession of the Petre estates, still less to the actual possession thereof, because if by "actual possession" physical possession was meant, upon the death of Bernard, the persons who became entitled to such actual possession and the receipt of the rents and profits were the assignees under the deed of assignment. But he pointed out that the words creating the power of revocation were "shall become entitled," and so on, "under the limitations of" the Petré settlement, and that those words limited and qualified the expression "actual possession." There seemed to his Lordship to be good ground for contending that in such clauses in this connection the expression "actual possession" had come to be used as opposed to presently entitled in reversion or remainder. His Lordship applied what was said by Sir John Romilly, M.R., in *Hogg v. Jones*, 32 Beav. 45, where there was a gift of heirlooms by reference to the actual possession of real estate; and the Master of the Rolls there held that the heirlooms went to a person who was, in fact, deprived of the possession of the real estate by disentail.

It is seen, therefore, that Mr. Justice Joyce attached no more meaning to "actual possession" than the purely technical one which is commonly ascribed by lawyers to "possession" when unenforced. But what the learned judges of the Court of Appeal would have held, if it had been determined to bring the case before that court, can only be conjectured. Whether they would have considered that "actual" makes a difference by adding something really of substance to the word "possession," or whether it ought to be regarded as a mere redundancy and superfluous, as Mr. Justice Joyce did, is wholly problematical. It is, consequently, extremely advisable to select some other word than "actual" where it is specifically desired that the technical meaning of "possession" shall not prevail. "Physical," or a word synonymous therewith, might advantageously be inserted—in substitution for, or as supplementary to, "actual"—before "possession," if a modification of the technical meaning generally ascribed to that term is intended. All the uncertainty which arises from the conflict of authority to which we have called attention would then be averted.—*Law Times*.

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**THE REGENCY ACT.**

In the last reign there was no necessity for the passing of a Regency Act, inasmuch as the heir apparent to the throne, the present King, had on the accession of the late King reached the mature age of five-and-thirty. A Regency Act will now be rendered necessary owing to the tender years of the present heir apparent to the throne, the Duke of Cornwall. The fiction of law is that the King must always be in full maturity of intellectual power, and as such exempt from the ordinary disabilities and immunities of infancy. Testamentary guardianship is the creation of statute, and it has never been suggested that the prerogative enables a King to appoint a guardian to his successor, which must be effected by legislation. The only Regency Act providing for the case of an infant Sovereign which ever took effect was that of the reign of Henry VIII., 28 Hen. 8, c. 7, s. 23, which came into operation at the accession of Edward VI. On other occasions since the reign of Henry VIII. Regency Acts have been passed nominating or giving to the King the power of nominating a Regent or a council. But the duties of royalty have never since been discharged by a Regent in consequence of the infancy of the King (see Anson's Law and Custom of the Constitution, ii., The Crown, Part 1, pp. 247-249). The principles for the determination of the question of a Regency since the accession of William IV. in 1830 have not been of an abstract character, but have in each case been laid down with reference to the actual circumstances of the situation. The three cases the subject of legislation since that event were the death of William IV. in the minority of the Princess (Queen) Victoria; the death of the late Queen Victoria while her successor, the King of Hanover, was out of the realm; and the death of the late Queen before any child of hers, being her successor, had reached the age of eighteen. In the first case the provision was that the Duchess of Kent (the mother of the late Queen Victoria) should be sole Regent uncontrolled by any council other than the ordinary responsible Ministers of the Crown: (1 Will. 4, c. 2). In the second case, that of providing for the absence from

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the realm of the late Queen Victoria's successor at the time of her decease, a precedent of Queen Anne's reign was followed (6 Anne, c. 7) by which the administration of the government was to be committed to "Lords Justices" till the King's arrival: (7 Will. 4 & 1 Vict. c. 72). In the third case, in the event of any child of Queen Victoria succeeding to the throne before the age of eighteen, the late Prince Consort as the surviving parent was to be Regent without any limitations upon the exercise of the royal prerogatives except an incapacity to assent to any bill for altering the succession to the throne or affecting the uniformity of worship in the Church of England or the rights of the Church of Scotland: (3 & 4 Vict. c. 22). The attainment of full age on the part of the late Queen's children during their lifetime rendered this statute of no effect, and no necessity arose for the passing of a fresh Regency Act at any subsequent period of Queen Victoria's reign or during the whole period of the reign of Edward VII.: (see Sheldon Amos' *Fifty Years of the English Constitution*, 1830-1880, pp. 212, 213).—*Law Times*.

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#### PRINCIPAL AND AGENT.

In *Young v. Toynbee*, [1910] 1 K.B. 215, 79 L.J.K.B. 208, the Court of Appeal has taken a step further in developing the doctrine of *Collen v. Wright*, and justified the opinion thrown out by the late Kekewich, J., in *Halbot v. Lens*, [1901] 1 Ch., at p. 349. Where an agent, having had a continuing authority conferred upon him, purports to exercise it after it has in fact been revoked by the principal's lunacy or death, that fact being unknown to the agent as well as the third party, the agent is bound by an implied warranty of his authority as in other cases. *Smout v. Ilbery*, 10 M. & W. 1, 62 R.R. 510, is overruled, unless peradventure it was decided on the assumption that no reasonable man could suppose any agent to warrant that a principal who had gone to China was living; in fact the news of his death took five months to reach England. But if it were so, the case is still deprived of the general authority it has usurped for two generations, and decisions rendered on that supposed authority fall

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with it. There remains untouched the anomalous rule of the common law, contrary to all other systems and deliberately reversed by British Indian legislation, that the death of the principal absolutely revokes the agent's authority without regard to the agent having notice of it. Perhaps this rule may be mitigated in the manner suggested by Brett, L.J., in *Drew v. Nunn* (1879), 4 Q.B. Div., at p. 668. Subject to that possibility, we now remedy our law's injustice to the creditor only by the not very just expedient of making a no less innocent agent liable.—*Law Quarterly*.

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Not as a matter of news, but of record, we note that the Royal proclamation by which the British Colonies of Cape Colony, Orange River Colony, Natal and the Transvaal become the Dominion of South Africa was read at Victoria on May 31st. The day chosen was the eighth anniversary of the Boer acceptance of the British terms at the close of the war. Lord Gladstone was sworn in as Governor-General and the first Union Cabinet was formed under the Premiership of General Louis Botha, the oath being administered by Sir John H. De Villiers, Chief Justice of the Supreme Court of South Africa. We have already given a sketch (ante vol. 45, p. 309) of the draft Act of Union, and to this we would refer our readers.

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Our exchanges refer in most complimentary terms to the late Mr. Justice Brewer of the Supreme Court of the United States. One writer says: "He died (at the age of 73) as all strong men and brave men would wish to die, in the full use of his superb faculties, mental and physical." Another writer says: "His death is especially untimely as it removes one of the members of the Supreme Court at a time when that tribunal is about to pass on some of the most important cases in the country's history." He was a worthy member of a most learned and august Bench. His successor is Charles E. Hughes, governor of the State of New York, whose appointment will meet with the universal approval of all honest men.

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It is remarkable that the silk gown of the Bench and Bar owes its original use to its having been adopted as a form of mourning at the death of an English Sovereign. Up to the end of the seventeenth century, with the exception of the prescribed dress of the judges and serjeants, no custom was officially recognized in the courts of justice other than that in ordinary use in the halls of the Inns of Court—the cloth or stuff gown of the utter barrister, and the one with black velvet and tufts of silk worn by the readers and benchers—and this continued invariably to be the constant dress of an advocate till the death of Queen Mary in 1694, at which time the present silk gown was introduced as mourning, and, having been found more convenient and less troublesome than the other, has since been continued. The late Sir Frederick Pollock is said to have expressed an opinion in reference to the ordinary costume of the Bar that the Bench and Bar went into mourning at the death of Queen Anne, and have so remained ever since. The court dress—black silk gowns and large wigs—if not first brought into use at the funeral of Queen Anne, certainly came into fashion only about the time of the death of her elder sister, Queen Mary: (See Pulling's *Order of the Coif*, pp. 223-224.)—*Law Times*.

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One of the most entertaining legal opinions we have ever encountered was that written by Mr. Justice Irving G. Vann of the New York Court of Appeals in the case of *Smith v. United States Casualty Company*, decided Feb. 8, 1910. This opinion, which was not less able than interesting, was announced in an insurance case, the court upholding without a dissenting voice the common law right of a man to change his name, and his right to recover a policy of insurance issued to him under an assumed name:—

“The history of literature and art furnishes many examples of men who abandoned the names of their youth and chose the one made illustrious by their writings or paintings. Melancthon's family name was Schwartzerde, meaning black earth, but as soon as his literary talents developed and he began to forecast his future he changed it to the classical synonym by which he is known to history.

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Rembrandt's father had the surname Gerretz, but the son, when his tastes broadened and his hand gained in cunning, changed it to Van Ryn on account of its greater dignity.

A predecessor of Honoré de Balzac was born at Guez, which means beggar, and grew to manhood under that surname. When he became conscious of his powers as a writer he did not wish his works to be published under that humble name, so he selected the surname Balzac from an estate that he owned. He made the name famous, and the later Balzac made it immortal.

Voltaire, Molière, Dante, Petrarch, Richelieu, Loyola, Erasmus and Linnæus were assumed names. Napoleon Bonaparte changed his name after his amazing victories had lured him toward a crown, and he wanted a grander name to aid his daring aspirations. The Duke of Wellington was not by blood a Wellesley, but a Colley, his grandfather, Richard Colley, having assumed the name of a relative named Wesley, which was afterwards expanded to Wellesley.—*Green Bag*.

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The third annual meeting of the New York Bar Association, held in Rochester, in January last, was as usual very interesting. Some of the papers read were: The necessity for a Court of Criminal Appeal; The dishonesty of sovereignties in reference to meeting their obligations on contract and tort as required of private corporations and individuals; The Employers Liability Act, etc. The committee on the commitment and discharge of the criminally insane was submitted and discussed. This report draws attention to the misuse of the right of habeas corpus whereby persons detained as insane in public institutions can obtain repeated hearings on an issue of regained sanity, unhampered by prior adverse adjudications. This evil has been so acute that the suggestion is made that insanity or other mental deficiencies should no longer be a defence against a charge of crime, nor should it prevent a trial of the accused, unless his mental condition is such as to satisfy the court, upon its own enquiry, that he is unable by reason thereof to make proper preparation for his defence. This is a somewhat drastic and ill-considered suggestion, and not likely to go into force without considerable discussion and amendments, but the evil exists, and Thaw cases are all too common.

**REVIEW OF CURRENT ENGLISH CASES.**

(Registered in accordance with the Copyright Act.)

**SOLICITOR AND CLIENT—VERBAL AGREEMENT AS TO COSTS—NO COSTS PAYABLE BY CLIENT—RIGHT TO RECOVER COSTS FROM OPPOSITE PARTY—ATTORNEYS' AND SOLICITORS' ACT, 1870 (33-34 VICT. c. 28), ss. 4, 5—(9 EDW. VII. c. 28, ss. 24, 28).**

*Gundry v. Sainsbury* (1910) 1 K.B. 645. This was an appeal from the decision of a Divisional Court (1910) 1 K.B. 99 (noted, ante, p. 124). The question being whether a plaintiff having a verbal agreement with his solicitor that he was not to pay any costs, could, nevertheless, recover costs against the defendant. The Divisional Court held that he could not, and the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.J.J.) have affirmed that decision, on the ground that apart from the Act of 1870 a suitor cannot recover from his opponent more costs than he is liable to pay, inasmuch as party and party costs are only awarded as an indemnity; and that even had the Act been applicable it was not necessary for the purpose of applying the proviso of s. 5 (Ont. Act, s. 28) that the agreement should be in writing.

**NEGLIGENCE—PUBLIC SCHOOL—DUTY TO MAINTAIN SCHOOL PREMISES—INJURY TO PUPIL CAUSED BY NEGLECT TO REPAIR.**

In *Ching v. Surrey County Council* (1910) 1 K.B. 736, the plaintiff, a pupil at a public elementary school, was injured by his foot being caught in a hole in an asphalt pavement in the school premises, which it was the duty of the defendants, by statute, to keep in repair. The Court of Appeal (Lord Halsbury, and Moulton, and Farwell, L.J.J.) held, affirming the judgment of Bucknill, J., that the plaintiff was entitled to recover damages for the injury so occasioned.

**SALE OF GOODS INDUCED BY FRAUD OF PURCHASER—PLEDGE OF GOODS BY PURCHASER—RIGHT OF VENDOR TO DISAFFIRM CONTRACT—BANKRUPTCY OF FRAUDULENT PURCHASER.**

In *Tilley v. Bowman* (1910) 1 K.B. 745, a firm of Kirkness & Sons by means of fraudulent representations induced the defendant to sell them certain goods, which the purchasers then pawned with a pawnbroker, and Kirkness & Sons were shortly after-

wards declared bankrupts, and the plaintiff was appointed trustee in bankruptcy. The defendants having discovered the fraud went to the pawnbroker and redeemed the goods of which they then claimed to retain possession as against the plaintiff. The present action was then brought in which the plaintiff claimed the goods or the value thereof less the amount paid by the defendants to the pawnbroker for the redemption; but Hamilton, J., who tried the case, came to the conclusion that the defendants, on discovering the fraud of Kirkness & Sons, were entitled to disaffirm the contract and retake possession of the goods even after the bankruptcy order had been made, and that they were entitled to set-off the damages they had sustained by the fraud (in this case the amount they had had to pay the pawnbroker) against the part of the purchase money which they had received from Kirkness & Sons.

**DISCOVERY—EXAMINATION OF DEFENDANT FOR DISCOVERY LIBEL—  
INNUENDO—INTERROGATORY AS TO THE MEANING IN WHICH  
DEFENDANT USED WORDS COMPLAINED OF.**

*Heaton v. Goldney* (1910) 1 K.B. 754 was an action for libel, in which the plaintiff claimed to examine the defendant for discovery, as to the meaning in which he used the words complained of in the action. Bucknill, J., held that such an interrogatory was admissible; but the Court of Appeal (Williams and Farwell, L.J.J.), held that it was not, on the ground of want of precedent, and as being oppressive; but inasmuch as the object of all examinations for discovery is to draw, if possible, from the party examined admissions which will support the opposite party's case, the reasons for disallowing the interrogatory in question do not seem particularly cogent.

**ADMIRALTY—COLLISION—DAMAGE—SOUND SIGNALS.**

*The Curran* (1910) P. 184. This was an appeal from the decision of Deane, J., finding the appellant guilty of negligence causing a collision. The appeal was on the weight of evidence. It was proved that the other vessel had sounded fog signals, but the appellants proved that they had not heard them until within a very short distance, too late to prevent the collision; in these circumstances Deane, J., held that the failure to hear the signals was evidence of there not being a proper look-out; and the Court of Appeal (Lord Halsbury, and Moulton, and Farwell, L.J.J.) declined to interfere with his decision.

PRINCIPAL AND SURETY—RELEASE OF PRINCIPAL—DISCHARGE OF  
SURETY—AGREEMENT BY SURETY THAT CREDITOR MAY COM-  
POUND WITH DEBTOR.

*Perry v. National Provincial Bank of England* (1910) 1 Ch. 464 was an action by a surety claiming that he was released by reason of the creditors having discharged the principal debtors. The agreement of suretyship between the plaintiff and defendants expressly provided that the defendants might, without affecting their rights against the plaintiff "exchange or release any other securities held by the bank for or on account of the moneys thereby secured or any part thereof." . . . and "compound with, give time for payment of, and accept compositions from and make any arrangement with, the debtors or any of them." The principal debtors were a firm of Perry Brothers, who, in 1908, being on the verge of insolvency, made an arrangement with their creditors, under which arrangement a company was formed to take over certain properties of the firm, and in consideration thereof they issued debentures to the creditors at the rate of 25 per cent. for each £1 of their debts in full discharge thereof. At this time the total debt due to the bank from Perry Brothers was £3,530, from which was deducted £1,630, the value of certain securities held by the defendants against the property of Perry Brothers, leaving a balance of £1,900 in respect of which the defendants accepted the debentures of the company. In making this arrangement the mortgages made by the plaintiff were not taken into account. It subsequently turned out that the defendants were unable to realize the £1,630 from the securities they held against the property of Perry Brothers, and the defendants then gave notice of sale of the property mortgaged to them by the plaintiff, who, thereupon, brought the present action to restrain the sale and for a declaration that the plaintiff had been released from his suretyship. Neville, J., who tried the action, considered that the principal debtors had been released by the defendants, and that they were not entitled to enforce the mortgages given by the plaintiff as to any part of the claim; but the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Buckley, L.J.J.) came to a different conclusion, and held that although the acceptance of the debentures for the £1,900 had released the debt as to that amount, yet as to the balance of £1,630 that was still unpaid, and under the agreement the defendants were entitled to recover against the plaintiff that amount.

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LANDLORD AND TENANT—EXECUTION AGAINST LESSEE—JUDGMENT CREDITOR—LANDLORD'S RIGHT TO RENT AS AGAINST EXECUTION CREDITOR—"RENT"—PREMIUM FOR LEASE—LANDLORD AND TENANT ACT, 1909 (8 ANNE, c. 18), s. 1—(R.S.O. c. 342, s. 19).

*Cox v. Harper* (1910) 1 Ch. 480. Foreclosure action. An interpleader issue had been directed in the following circumstances. One Innocent was the lessee of a public house. He mortgaged his interest to Cox the plaintiff, and gave a second mortgage to his lessors, a brewery company. In 1901, Innocent became bankrupt and the defendant was appointed his trustee in bankruptcy. In 1902 the company went into possession as second mortgagees, and let the premises to a tenant for £150 rent, and an additional yearly sum of £1,250 in lieu of premium for goodwill. On 8th March, 1909, the company obtained judgment against this tenant for £960 and gave him a month's notice to determine his tenancy. On March 9th, 1909, before the tenancy had expired the plaintiff commenced this action for foreclosure, and on 12th March a receiver and manager was appointed to whom the company was directed to give up possession. Later on the same day the company the sheriff levied execution in respect of the company's judgment debt. The receiver claimed as against the execution creditors, payment of the £150 and £1,250 for a year's rent due to him as landlord, under 8 Anne c. 18, s. 1 (R.S.O. c. 342, s. 19). Joyce, J., gave effect to the receiver's contention as to £150, but held that the £1,250 was not rent, and his judgment was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Buckley, L.J.J.).

PRACTICE—ORDER DISMISSING ACTION AS FRIVOLOUS—FINAL OR INTERLOCUTORY—APPEAL.

*In re Page, Hill v. Fladgate* (1910) 1 Ch. 489. An order was made dismissing an action as frivolous and vexatious. By the Rules of court different periods are allowed for bringing appeals from interlocutory and final orders. An appeal was brought which was not in time if the order was to be regarded as interlocutory. The Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Buckley, L.J.J.), held that for the purpose of appeal such an order must be regarded as interlocutory. At the same time Buckley, L.J., is constrained to admit that it would be reasonable to say that such an order is a final order. It is somewhat difficult to reconcile with sound reason, that a final order is an interlocutory order for the purpose of an appeal.

**PARTNERSHIP—BREACH OF DUTY AS PARTNER—DISSOLUTION OF PARTNERSHIP—NOTICE.**

*Green v. Howell* (1910) 1 Ch. 495. In this case the plaintiff and defendant were partners under a deed which provided that in the event of either partner committing any breach of the partnership articles or of his duty as a partner, the other might by notice terminate the partnership, provided that if any question should arise whether a breach had been committed it should be referred to arbitration in case the offending partner so requested in writing within a given time. Under this clause the plaintiff without any preliminary warning gave the defendant notice of dissolution, on the ground of his having committed a flagrant breach of his duty as partner. The plaintiff brought the action for a declaration that the partnership was duly determined by the notice, and for consequential relief. The action was tried before Neville, J., and the defendant disputed the validity of the notice, as having been given without first calling the defendant's attention to the alleged breaches of duty and giving him an opportunity to be heard, which objection was overruled and judgment given in favour of the plaintiff, which was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Buckley, L.J., and Joyce, J.), the dicta of Romer, J., in *Barnes v. Young* (1898), 1 Ch. 414, which supported the defendant's contention being overruled.

**INDUSTRIAL AND PROVIDENT SOCIETY—AGREEMENT TO REFER TO ARBITRATION DISPUTES BETWEEN MEMBERS AND SOCIETY — ULTRA VIRES—STAY OF PROCEEDINGS.**

*Cox v. Hutchinson* (1910) 1 Ch. 513. The plaintiff in this case was a member of an Industrial and Friendly Society and brought his action for a declaration that certain resolutions passed by the society were ultra vires. By the rules of the society it was provided that all disputes between the society and its members were to be referred to arbitration. The defendants having moved that all proceedings be stayed, it was held by Warrington, J., that the plaintiff's claim was a dispute within the meaning of the rules, and must be referred to arbitration, and that the question of ultra vires made no difference.

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REPORTS AND NOTES OF CASES.

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**Dominion of Canada.****SUPREME COURT.**

Que.]

[March 11.

**ELECTRIC FIREPROOFING CO. OF CANADA v. ELECTRIC FIREPROOFING CO.**

*Contract—Assignment of patent rights—Implied warranty—Validity of patent—Novelty—Combination producing new and useful results.*

Where no express agreement or special circumstances exist which might give rise to an implied warranty, an assignment of "all the right, title and interest" of the assignor in a patent of invention does not import any warranty on the part of the assignor as to the validity of the patent. Judgment appealed from, Q.R. 34 S.C. 388, affirmed.

Per IDINGTON, J.:—In the present case the patents were valid. Appeal dismissed with costs.

*Atwater, K.C., and Duclos, K.C., for appellants. J. E. Martin, K.C., for respondents.*

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Ont.]

**UNION BANK OF CANADA v. CLARK.**

[March 11.

*Suretyship—Death of surety—Continuance—Powers of executors—Extension of time—Simple contract of suretyship—Release of one surety under seal—Confirmation of original contract.*

C. and others executed an agreement not under seal, by which they undertook to guarantee payment of advances by a bank to an industrial company. The guarantee was to be continuing and the bank could deal with the securities for such advances as it saw fit, the doctrines of law and equity in favour of a surety not to apply thereto. One of the sureties wishing to be discharged, a document under seal was executed by the others for the purpose, and the parties thereby ratified and confirmed the said guarantee and agreed to be bound as if the discharged

surety had never been a party to it. C. having died, his executors and the surviving sureties and the bank executed an agreement acknowledging the amount due by him to the bank, consenting to a renewal of notes covered by the guarantee, and confirming the latter. More than six years after C.'s death, the bank brought action to recover from his executors the amount so acknowledged to be due.

*Held*, that the discharge of the surety by writing under seal did not convert the original guarantee into a specialty and that the claim of the bank was barred by the Statute of Limitations.

Per DAVIES, IDINGTON and DUFF, JJ., that the executors had no power to continue the guarantee and the claim against the estate was discharged by time for payment granted the principal debtor.

Appeal dismissed with costs.

*Raney, K.C., and Hutchinson, K.C., for appellants.*

*Watson, K.C., and Lavell for respondents.*

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## Province of Ontario.

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### COURT OF APPEAL.

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Moss, C.J.O., Garrow, Meredith, and Magee, JJ.A.] [May 12.  
REX v. YORKCMA.

*Criminal law—Abduction of girl under 16—Evidence—Leave to Appeal.*

The prisoner was convicted of unlawfully taking an unmarried girl under 16 out of the possession and against the will of her mother contrary to s. 315 of the Crim. Code.

*Held*, that the evidence was sufficient under the statute; but, apart from that, the prisoner's own intention in the matter were unimportant as under the section the object or intention with which the girl was taken, be it innocent or wicked, was unimportant. No question of the mens rea could arise, for the statute is prohibitive, and any one dealing with an unmarried girl under 16 does so at his peril. Application refused.

*W. A. Henderson, for prisoner. Cartwright, K.C., for Crown.*

Full Court.]

REX v. FRANK.

[May 12.

*Criminal law—Evidence of accomplice—Corroboration.*

Case reserved under ss. 1014, 1015, Crim. Code by the junior judge of the County Court of Wentworth.

The accused was tried before him, on the charge of unlawfully conspiring with one Morden to defraud the Hamilton Steel and Iron Company by falsely increasing the weight of scrap-iron sold by the accused to the company. The case stated that the principal evidence against the accused was given by Morden, that the learned judge believed his evidence, and was of opinion that it was sufficient to convict without corroboration. It further appeared that the judge was of opinion that Morden's evidence was corroborated in material particulars, and there was some evidence in support of this view. Two questions were submitted by the learned judge: 1. Had I the power to convict the prisoner on the evidence of an accomplice alone? 2. If not, was there sufficient corroborative evidence?

*Held*, that an accomplice is a competent witness, and there is no rule or statute which requires that his evidence must be corroborated. The consequence is inevitable that if credit be given to his evidence it may be sufficient of itself to convict the accused and no corroboration is necessary. The first question was therefore answered in the affirmative, the second calling for no answer. See *In re Meunier* (1894), 2 Q.B. 415; *The King v. Tate* (1908), 2 K.B. 180; *The King v. Warren* (1909), 2 Crim. Cas. 194, 25 Times L.R. 633; *Regina v. Beckwith* (1859), 8 C.P. 274.

DuVernet, K.C., for prisoner. Cartwright, K.C., for Crown.

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HIGH COURT OF JUSTICE.

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Riddell, J.]

SCHWENT v. ROETTER.

[May 6.

*Gift—Money in bank—Transfer to joint credit of donor and daughter—Death of donor—Right of survivor—Claim of executor of donor.*

Interpleader issue. John Schwent and his wife Magdalena had money deposited in a bank at Dunnville to their joint credit. On the 27th April, 1908, the wife died. John Schwent, on May 22nd, 1908, delivered a document to the bank in these words:

"This is to certify that I transfer the money in my name John Schwent and Magdalena Schwent in our savings bank account number S. 27 in your bank to the joint credit of myself, the sole survivor, and my daughter Magdalena Schwent to be drawn by either of us. John Schwent." The money lay wholly undisturbed in the bank until the death of John Schwent on the 5th July, 1909. He had on the 25th September, 1900, made his will, whereby he appointed his daughter Magdalena and his son Christian executors. After the death Christian claimed this money in the bank as being part of the estate. Magdalena, who had married one Roetter, claimed it as her own. The bank were allowed to pay the amount into court, less the costs, and this issue was directed, with Christian Schwent as plaintiff and Magdalena Roetter as defendant, to determine the question "which of the said parties is entitled to the above-mentioned sum of money paid into court," amounting to \$1,285.18. The real question to be decided was whether the money belonged to the executors as assets of the estate of John Schwent, deceased, or to the defendant as her own private property. The deceased had one son, the plaintiff, and four daughters, one of them the defendant.

*Held*, 1. Following *Re Ryan*, 32 O.R. 224, that the plaintiff should succeed unless there was some difference between the case of a wife and that of a daughter, but such a distinction had not been suggested. The issue must therefore be decided in the defendant's favour, both as to form and substance.

2. There is no necessity for another action as Con. Rule 1114 gives the trial judge the power to dispose of interpleader proceedings.

*R. S. Colter*, for plaintiff. *Douglas*, K.C., and *J. A. Murphy*, for defendant.

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Divisional Court, K.B.]

[May 6.

*Rushton v. Galley*.

*Way—Private lane—Dedication—Acceptance by municipality—Sidewalk placed and repaired by former owner—Injury to person using—Negligence—Contributory negligence—Private liability—Notice of defect—Constructive notice.*

Appeal by the plaintiff from the judgment of LATCHFORD, J., dismissing the action. The plaintiff on the 24th October, 1908, met with an accident, as he alleged, by stepping into a hole in a defective sidewalk at what is called "Maderia Place," being an

open space extending easterly from Parliament Street, in the city of Toronto. The plaintiff alleged that the defendant was the owner of Maderia Place, that it was open to the public, and that the defendant was guilty of negligence in allowing this sidewalk to become and to continue out of repair so much so that, by reason of its bad condition, the accident happened to the plaintiff, and he claimed damages for his injuries.

The action was in part tried with a jury, who found that the defendant or her husband first have knowledge of the hole in the sidewalk on Saturday night, October 24th. That the sidewalk became out of repair on Thursday, October 22nd. That the defendant was negligent in not repairing the sidewalk, having sufficient time to do so before the accident, and that the plaintiff by exercise of reasonable care could not have avoided the accident.

BRITTON, J.:—As the defendant did not know of the defective condition of the walk until after the accident, the only negligence which the jury could find, and what they probably intended to find, was that the defendant did not keep such a watchful eye over the walk as to prevent its remaining in a defective condition for any longer time than was reasonably necessary actually to do the work of repair.

If the defendant was the owner, there was an invitation by her to the public to use the place for any purpose of walking or driving upon and over it, and she would be liable if she placed upon it, or allowed to remain upon it, after knowledge of its being placed by others, anything in the nature of a trap, dangerous to the users of the place. This hole in the walk was not a trap—the plaintiff was not using the walk as an ordinary person on foot would use it; so, as I view the case as presented by the plaintiff and upon the evidence, he is not entitled to recover.

On the other branch of the case, I agree with the trial judge that Maderia Place is a public street which ought to be kept in repair by the city corporation. So far as appears, it is not a street established by by-law of the corporation, but it has been "otherwise assumed for public user by such corporation," within the meaning of s. 607 of the Municipal Act.

The plaintiff contends that, even if this is a public street, the defendant, having done the work of repair, assumed the duty, and is therefore liable for neglect of such duty. I do not agree that the voluntary doing and doing continuously up to a certain date something that another ought to do, creates a liability for neglect or refusal to continue; and further, if there could be

liability for neglect to repair, it could only arise after knowledge of want of repair. Here there was no knowledge. Merely not knowing the want of repair before the accident happened is not sufficient to warrant a finding of negligence. The defendant was not as against the plaintiff bound to see that the walk was in a constant state of reasonable repair. It would be quite different if the defendant constructed a dangerous walk or placed an obstruction or caused a pit to be dug near the walk or a hole to be made in it—in such a case there might be liability.

In the present case, in my opinion, the defendant is not liable, and the appeal should be dismissed with costs.

RIDDELL, J., was of opinion, for reasons stated in writing, that the trial judge was right in finding that the owner of the land intended to dedicate this lane, and that the corporation had accepted the dedication long before the defendant became owner of the property adjoining; that the lane was a public highway; that the plaintiff had a right there; that he was not guilty of contributory negligence, the jury having so found; that the defendant placed the sidewalk upon the lane, and, if she could be called a trespasser, she was liable irrespective of negligence: *Dygert v. Johenck*, 23 Wend. 446, 447; *Calder v. Smalley*, 66 Iowa 219; *Congreve v. Morgan*, 18 N.Y. 84; Dillon on Municipal Corporations, ss. 1031, 1032; *Hadley v. Taylor*, L.R. 1 C.P. 53; *Place v. Reynolds*, 53 Ill. 212; *Portland v. Richardson*, 54 Me. 46; *Osborne v. Union Ferry*, 53 Barb. 629; *Jennings v. Van Schaich*, 108 N.Y. 530; that the defendant had not proved any express permission or license from the corporation to place or repair, but sufficient appeared to shew that the corporation tacitly licensed and permitted what was done. *Robins v. Chicago City*, 4 Wall. S.C. 657; and in such a case the private liability to repair is co-extensive with that of the city corporation, and not more onerous, that is, there must be ordinary care and diligence and absence of negligence. *Drew v. New River Co.*, 6 C. & P. 754, 756; *Peoria v. Simpson*, 110 Ill., at p. 301; *Hopkins v. Owen Sound*, 27 O.R. 43; *Weller v. McCormick*, 47 N.J.L.T. 397, 398; and here, the jury having negatived all negligence except the failure to repair from Thursday, the day of the breaking, to Saturday, the day of the accident, it must be assumed that there was no defect in the original construction of the sidewalk; the jury could not be allowed to infer constructive notice or to charge negligence in not repairing what was not known to be defective: *McNirov v. Town of Bracebridge*, 10 O.L.R. 360; Denton, pp. 243 et seq.; Biggar,

p. 835, note (e); and a jury cannot be allowed to find negligence in not repairing within a time which would not justify a court in inferring notice; and, therefore, the judgment was right, and the appeal should be dismissed with costs.

FALCONBRIDGE, C.J., agreed in the result.

MacGregor, for plaintiff. Dewart, K.C., and Dunbar, for defendant.

Divisional Court, Ex.]

[May 10.

REX v. ACKERS..

*Liquor License Act—Conviction—Jurisdiction of justices of the peace — Information laid before and summons issued by police magistrate—Oral request to justices to act—Jurisdiction not appearing on face of conviction—Warrant of commitment—Imprisonment—Habeas corpus—Amendment of conviction under s. 105—Other defects in warrant—Costs of conveying to gaol.*

Motion on behalf of the defendant for his discharge from custody, on the return of a writ of habeas corpus.

The information was laid by Hugh Walker, license inspector, against James Ackers, before Stewart Masson, police magistrate in and for the city of Belleville and the south part of the county of Hastings, for an offence under the Liquor License Act. Upon the information the police magistrate issued a summons to Ackers to appear at the town hall of the village of Sterling, before him, as such police magistrate, or before such other justices of the peace having jurisdiction as may then be there, to answer to the said complaint, and be further dealt with according to law. The intention was that the case should be dealt with by the local magistrates. The police magistrate did not attend on the return of the summons, but verbally requested Magistrate Bird to get another magistrate to sit with him, which he did, and the case was heard by these two justices of the peace, at the village of Sterling, and before them the prisoner appeared and pledged guilty to the charge, and thereupon, on the 3rd March, 1910, he was convicted and ordered to pay a fine of \$100, or, in default thereof, to be imprisoned for three months.

The objections taken are as follows:—

1. That the convicting magistrates had no jurisdiction to convict the prisoner, the initiatory proceedings having been taken before a police magistrate, and no request to act for him or his illness or absence appearing.

2. That the magistrates, having drawn up and returned to the clerk of the peace an order for the payment of money, could not afterwards file any conviction with him, and no minute of such order was served before commitment.

3. That an amended conviction could not be put in after the enforcement of the fine and costs by imprisonment.

4. That it cannot be learned from the proceedings whether the informant was a license inspector or a private individual, so that the rightful distribution of the penalty should ensue.

5. That the warrant of commitment recites a bad conviction, and does not conform with either of the convictions returned.

*Held*, that the conviction could not be supported as it did not disclose upon its face that the magistrates were acting at the request of the police magistrate. The prisoner, however, should not be discharged, but detained under the commitment and conviction amended under the Liquor License Act, s. 105 and sub-s. 1, 2, which was passed to cover a case of this kind. Order accordingly.

*J. B. Mackenzie*, for defendant. *Cartwright*, K.C., for Crown.

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## Province of Nova Scotia.

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### SUPREME COURT.

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Full Court.]      **McKINNON v. McPHERSON.**      [April 9.

*Illiterate person—Document executed by—Burden on grantor to shew good faith—Consideration not expressed—Effect of leaving blanks.*

Defendant obtained from plaintiff what purported to be a lease for a term of years of a tract of land for the purpose of carrying on certain mining operations thereon, with the privilege of taking wood, timber and coal necessary for such purpose. The number of years during which the lease should continue was left blank and the royalty to be paid as consideration for the lease was also left blank. Plaintiff was an illiterate farmer, speaking only the Gaelic language and unable to read and write, and defendant was his parish priest and enjoyed his full confidence.

The lease was signed by both plaintiff and his wife by their

marks and it did not appear that it was first read over and explained.

*Held*, 1. The circumstances of the execution of the document and the relation of the parties placed it in the category of instruments which have to be carefully scanned and the good faith of which must be fully established.

2. The burden was upon defendant of shewing that the transaction was fairly conducted as between strangers and that defendant understood the transaction, and that the deed contained the true provisions of the transaction so understood and that in the absence of such evidence the deed must be set aside.

3. It was not open to defendant to set up a consideration for the transaction not expressed on the face of the document.

Per DRYSDALE, J.:—The effect of the document as executed was a lease for years with an obligation on the part of the lessee to pay royalty not specified as to amount.

*O'Connor*, K.C., for appeal. *Robertson*, K.C., and *Phelan*, contra.

Laurence, J.]

[May 5.

IN RE ESTATE OF LONGWORTH.

MACDONALD v. EASTERN TRUST CO.

*Will—Construction—Bequests of shares in companies—Liability for calls—Dividends—Right to occupy land—Disposal of income.*

By his last will testator devised his shares in a number of companies to the defendant company in trust to pay the net income arising therefrom to his daughter M. for the term of her natural life and upon her death to go as in said will directed. Testator further devised to his said daughter M. the use of his homestead at T. and such lands about it and his farm L. as she wished to occupy, so long as she wished to live upon the premises, with power to the executors to sell such portions thereof, for the redemption of liabilities and the purposes of his estate, as M. might decide. After testator's death calls were made in respect of certain of the shares devised in trust, and the opinion of the court was sought as to the construction of the two paragraphs of the will referred to.

*Held*, 1. It would be improper to require M. to pay the calls made upon the shares, when, at her death, the shares and the benefit of the calls would go to others, and that, for this reason, the calls should be paid out of the general funds of the estate,

and the amount paid recouped on the death of M. and the division of the shares.

2. Dividends on the calls so paid should not go to M., but should be held as part of the general funds of the estate.

3. M. was not entitled to receive rents and income arising from the homestead and other lands which she was permitted to occupy.

4. The executors had no authority to sell such lands during the lifetime of M.

5. In the event of a sale of such lands the income from the proceeds of the sale should go into the residuum of the estate.

*Rogers*, K.C., for plaintiff. *Robertson*, K.C., for Eastern Trust Co. and residuary legatees.

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Drysdale, J.]

[May 23.

**ZWICKER v. LA HAVE STEAMSHIP CO.**

*Trial—Motion for postponement—Absence of material witness—Offer to admit facts—Disclosure.*

Motion was made for the postponement of the trial on the ground, among others, of the absence of a material witness for the defence.

*Held*, that it was not a sufficient answer to the application that the witness in question left the province after he had been subpoenaed, where it appeared that the plaintiff was asked before the witness left to disclose what he was wanted to prove, accompanied by an offer to admit facts.

A party who wishes to hold a witness in the province or to bring him back must be reasonable, and must apply for an admission of facts before the witness leaves, or must disclose sufficient reasons for bringing him back.

*Meagher*, for plaintiff. *J. A. Maclean*, K.C., for defendant.

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Graham, E.J.]

**NEVAY v. GILLIS.**

[May 30.

*Foreign judgment—Fraud going to jurisdiction—Distribution of estate—Restitution of share improperly obtained—Jurisdiction of court to enforce—Administrator—Fraud of in suppressing facts and failure to give notice—Conflict of laws.*

Defendant was a party to an application made by his brother L. J. G. to the Probate Division of the District Court of Salt

Lake Co., Utah, in the United States for a decree for the final settlement and distribution of the estate of a deceased brother of which L. J. G. had been appointed administrator. In the petition for the decree it was fraudulently alleged that, defendant, the administrator and two others were the sole surviving heirs and that each was entitled to one fourth of the residue, suppressing the fact that plaintiff, a sister of the deceased, was living and was equally entitled with the others. Plaintiff had no notice, actual or constructive. Defendant removed to the Province of Nova Scotia after having obtained payment of one fourth of the residue of the estate. In an action by plaintiff to enforce restitution of the proportion of her share received by defendant,

*Held*, 1. That fraud was one which went to the jurisdiction of the State Court and the validity of the decree.

2. Defendant could not make title to the excess over his own share received by him under the decree because it was not received bona fide and without notice, and that having been taken from the administrator who was guilty of a fraudulent breach of his duty the fund remained in his hands fastened with a trust which equity would enforce against him, and that he could not take advantage of his own wrong by setting up the finality of the decree.

3. A foreign judgment whether in rem or in personam is open to impeachment where it is fraudulently obtained.

4. As defendant and the administrator were equally participants in the fraud plaintiff was not obliged in the first instance to proceed against the administrator or resort to an action on the bond, but might proceed directly against defendant, and that the court of this province, where he was domiciled, would enforce restitution.

*Rowlings*, K.C., for plaintiff. *Gillies*, K.C., for defendant.

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## Province of Manitoba.

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### COURT OF APPEAL.

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Full Court.]

[April 25.

KNECHTEL FURNITURE CO. v. IDEAL FURNISHING CO.

*Promissory note—Indorser—Holder in due course—Estoppel.*

*Held*, 1. Under s. 131 of Bills of Exchange Act, R.S.C. 1906, c. 119, a person who indorses a promissory note not indorsed by the payee at the time may be liable as an indorser to the payee

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*Robinson v. Mann*, 31 S.C.R. 484, and *McDonough v. Cook*, 19 O.L.R. 267, followed in preference to *Jenkins v. Coomber* (1898), 2 Q.B. 168, and cases following it. Difference between above section and the corresponding section (56) of the Imperial Act pointed out.

2. Although the defendant company had made the note in question in pursuance of an agreement to assume the debt of another to the plaintiff company, yet, as there was a good and valuable consideration given for that assumption, the plaintiffs were holders in due course and the defendant company was liable upon the note.

3. The other defendants, being directors of the defendant company, having indorsed the note and induced the plaintiffs to enter into and perform the agreement in consideration of which the note was given, were estopped from disputing the validity of the transaction or setting up that the defendant company had not power to give this note: Bills of Exchange Act, s. 133.

*McDonough v. Cook*, supra, at pp. 272, 274, and *Lloyds Bank v. Cooke* (1907), 1 K.B. 794, followed.

*Hanneson*, for plaintiffs. *Mulock*, K.C., and *Loftus*, for defendants.

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Full Court.]

FOSTER *v.* STIFFLER.

[April 25.

*Vendor and purchaser—Right of purchaser to recover after conveyance in respect of incumbrances then discovered—Transfer under Real Property Act—Mistake as to amount of incumbrances—Misdirection in particulars of sale—Caveat emptor.*

Appeal from judgment of MATHERS, J., noted, vol. 45, p. 755, allowed with costs on the ground that the agreement of the parties had only been partially carried out, could not be said to have been merged in the transfers, thus taking the case out of the principle of the cases there cited and relied on by the judge below.

Order for entry of judgment in the court below declaring the plaintiff entitled to a vendor's lien on the lands conveyed and to be conveyed by him for the balance due under the agreement including the \$950 in dispute.

*McLaws*, for plaintiff. *Hoskin*, K.C., and *Montague*, for defendant.

Full Court.]            **EYRE v. MCFARLANE.**            [May 11.

*Statute of Limitations—Acknowledgment to take case out of statute—Promise to “fix it up all right.”*

A promise to “fix it up all right” in a week or two, in a letter written by the debtor in reply to a written demand for payment of the debt, is a sufficient acknowledgment to take the case out of the Statute of Limitations and start it running anew. *Edmonds v. Goater*, 21 L.J. Ch. N.S. 290, and *Collis v. Stack*, 1 H. & N. 605, followed.

A promise to pay the debt as soon as the debtor could get the money is conditional only and, without evidence that the debtor had got the money, would not be a sufficient acknowledgment to prevent the statute running.

*L. J. Elliott*, for plaintiff. *Howell*, for defendant.

Full Court.]            [May 18.

**IN RE NORTHERN CONSTRUCTION CO.**

*Company—Winding up—Dividend.*

Appeal from judgment of MACDONALD, J., noted, ante, p. 78, dismissed with costs.

### KING'S BENCH.

**Mathers, C.J.]            FONSECA v. JONES.**            [April 18.

*Settlement—Improvidence—Resulting trust upon conveyance by husband to wife—Trusts under Real Property Act—Parties—Uncertainty in trusts—Revocation—Independent advice—Acquiescence, laches and delay—Double possibility—The lulsion Act—Rule against perpetuities.*

1. Where a man executes a voluntary conveyance of lands to his wife, there is no presumption of a resulting trust in his favour, but it is open to the grantor or his representatives to shew that under the circumstances there was such resulting trust, and in that case the lands will be deemed in equity to be his. *Childers v. Childers*, 3 Jur. N.S. 1277, and *Marshall v. Crutwell*, L.R. 10 Eq. 328, followed.

2. Trusts of lands under the Real Property Act will be enforced in a Court of Equity: *In re Massey v. Gibson*, 7 M.R. 172,

and where there has been a deed of settlement executed by husband and wife of lands which, although formerly conveyed by personal representatives of the deceased husband, or those who would take if there had been no settlement, would be necessary parties to an action brought by the widow to set aside the settlement and they are the only parties who could ask for a rescission of the deed.

3. Such a deed of settlement, although it transferred all the property of the settlers to the trustees without power of revocation in trust to pay the net income or part thereof to the settlers or the survivor of them until the death of the survivor, and afterwards to distribute the corpus or the income thereof between the children or some of them in the absolute discretion of the trustees, was held in the peculiar circumstances set forth in the judgment not to be improvident.

4. If the trusts declared in a deed of settlement are too vague and uncertain to be executed, a trust in favour of the next of kin would result by operation of law, and the trustees would not take for their own benefit: *Lewin*, p. 164.

5. The settler may wish to protect himself from his own improvidence or against importunities of relatives and in such a case the absence of a power of revocation in the deed is not a ground for setting it aside. *Toker v. Toker*, 3 D.G.J. & S. 487, and *Phillips v. Mullings*, 7 Ch. Ap. 244, followed, and *Coutts v. Acworth*, L.R. 8 Eq. 558, distinguished.

6. As the trustees were not beneficiaries under the deed, the absence of independent advice in the execution of it was not important. *Huguenin v. Baseley*, 14 Ves. 273, distinguished.

7. The plaintiff, one of the settlers, after the death of her husband, had, in the circumstances set forth in the judgment, estopped herself from complaining of the deed by acquiescence, laches and delay. *Turner v. Collins*, L.R. 7 Ch. Ap. 329; *Allcard v. Skinner*, 36 Ch.D. 145, and *Jarratt v. Aldom*, L.R. 9 Eq. Cas. 463, followed; *Sharp v. Leach*, 31 Beav. 491, distinguished.

8. As the deed in question required that the estate should be converted into money at the death of the widow, in contemplation of equity the estate conveyed consisted of personal estate: *Attorney-General v. Dodd* (1894), 2 Q.B. 150, and since the rule against a "double possibility" or "a possibility upon a possibility" has, according to *In re Bowles*, *Amedroz v. Bowles* (1902), 2 Ch. 650, no application to personal estate, therefore the deed was not objectionable as offending against such rule, al-

though it might have been in the absence of a direction for such conversion.

9. Under the deed there might be an accumulation of income beyond the period permitted by the Thellusson Act, if the trustees should exercise the power given them of withholding the shares of some of the beneficiaries and giving them to others, and an accumulation beyond the permitted period would be void under the Act, but the gift itself would not be void unless it would also infringe the rule against perpetuities. Godefroi on Trusts, 912; *Jagger v. Jagger*, 25 Ch.D. 729, and *Tench v. Cheese*, 24 L.J. Ch., at p. 55, followed.

10. The possibility of a power in a deed of settlement being at some future time exercised so as to infringe the rule against perpetuities does not make the power itself void, where it is such that it may be exercised in a manner entirely unobjectionable. *Clark v. Dakyns*, L.R. 10 Ch. Ap. 35; *Picken v. Matthew*, 10 Ch.D. 264, and *Re Bowles* (1905), 1 Ch. 371; followed; *Leake v. Robinson*, 2 Mer., at 389, distinguished.

11. As the widow and children of a deceased son would be entitled under the deed to a share of the estate, and so were interested in maintain the deed, they were necessary parties to the action attacking it, which therefore failed for lack of parties, notwithstanding that the executors of the will of said son had been made parties. These executors took nothing under the deed and did not represent the infant children of their testator, and therefore had been made parties unnecessarily.

*McMeans*, K.C., *Elliott and Macneill*, for plaintiff. *Aikins*, K.C., and *Dennistoun*, K.C., for defendant trustees. *Pitblado, Fullerton, O'Connor, Young, Blackwood, Chandler and Chalmers*, for the several other defendants.

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Metcalf, J.]

ALDONS *v.* SWANSON.

[April 29.

*Principal and agent—Revocation of agency—Work done before revocation—Commission on sale of land—Quantum meruit—Distinction between power to revoke authority and right to do so.*

An agent who has been given the exclusive sale of real estate for a limited period on terms of being paid a commission in case of sale is entitled to substantial damages upon revocation of his authority, if he has, within the time limited, found a purchaser for the property as the result of special efforts and the expendi-

ture of money in advertising and otherwise which the principal knew or had reason to believe the agent would make and incur to find a purchaser.

*Prickett v. Badger*, 1 C.B.N.S. 296, and *Rowan v. Hull*, 2 A. & E. Ann. Cas. 884, followed; *Simpson v. Lamb*, 17 C.B. 603; *Topin v. Healy*, 11 W.R. 466, and *Houghton v. Ogar*, 1 T.L.R. 653, distinguished.

Although the principal may have power to revoke the authority given to the agent, he has not always the right to do so without liability for damages.

*Ferguson*, K.C., and *Collinson*, for plaintiffs. *Nason* and *Thomas*, for defendants.

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Macdonald, J.]

[May 3.

RE ALBERTA AND GREAT WATERWAYS RY. CO.

*Evidence Act—Order for attendance of witnesses for purposes of inquiry by foreign tribunal—Whether commissioners appointed by the government of another province under an Act of its legislature are a court or tribunal—Constitutional law—Ultra vires.*

*Held*, 1. Commissioners appointed by the government of another province under an Act of its legislature to conduct an inquiry constitute a court or tribunal within the meaning of s. 57 of the Manitoba Evidence Act, R.S.M. 1902, c. 57, as re-enacted by 5 & 5 Edw. VII. c. 11, and an order may be made under that section at the request of such commissioners requiring the attendance of witnesses in Manitoba to testify as to matters within the scope of the commission.

2. If there is nothing to prevent such commissioners from coming to Manitoba to take evidence, the order may properly require the attendance of such witnesses before the commissioners themselves at any place within this province named by them, as well as before an examiner appointed by them.

3. Sec. 57 of the Manitoba Evidence Act may be regarded as relating to the administration of justice in the province, also to a matter of a merely local or private nature in the province, and so it is not ultra vires of the local legislature under the B.N.A. Act, 1867.

*Re Wetherall and Jones*, 4 O.R. 713, not followed.

*Robson*, K.C., and *Coyne*, for witness. *Pitblado*, K.C., and *Montague*, for the commissioners.

though it might have been in the absence of a direction for such conversion.

9. Under the deed there might be an accumulation of income beyond the period permitted by the Thellusson Act, if the trustees should exercise the power given them of withholding the shares of some of the beneficiaries and giving them to others, and an accumulation beyond the permitted period would be void under the Act, but the gift itself would not be void unless it would also infringe the rule against perpetuities. Godefroi on Trusts, 912; *Jagger v. Jagger*, 25 Ch.D. 729, and *Tench v. Cheese*, 24 L.J. Ch., at p. 55, followed.

10. The possibility of a power in a deed of settlement being at some future time exercised so as to infringe the rule against perpetuities does not make the power itself void, where it is such that it may be exercised in a manner entirely unobjectionable. *Clark v. Dakyns*, L.R. 10 Ch. Ap. 35; *Picken v. Matthew*, 10 Ch.D. 264, and *Re Bowles* (1905), 1 Ch. 371; followed; *Leake v. Robinson*, 2 Mer., at 389, distinguished.

11. As the widow and children of a deceased son would be entitled under the deed to a share of the estate, and so were interested in maintain the deed, they were necessary parties to the action attacking it, which therefore failed for lack of parties, notwithstanding that the executors of the will of said son had been made parties. These executors took nothing under the deed and did not represent the infant children of their testator, and therefore had been made parties unnecessarily.

*McMeans*, K.C., *Elliott and Macneill*, for plaintiff. *Aikins*, K.C., and *Dennistoun*, K.C., for defendant trustees. *Pitblado, Fullerton, O'Connor, Young, Blackwood, Chandler and Chalmers*, for the several other defendants.

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Metcalfe, J.]

ALDONS *v.* SWANSON.

[April 29.

*Principal and agent—Revocation of agency—Work done before revocation—Commission on sale of land—Quantum meruit—Distinction between power to revoke authority and right to do so.*

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ture of money in advertising and otherwise which the principal knew or had reason to believe the agent would make and incur to find a purchaser.

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Although the principal may have power to revoke the authority given to the agent, he has not always the right to do so without liability for damages.

*Ferguson*, K.C., and *Collinson*, for plaintiffs. *Nason* and *Thomas*, for defendants.

Macdonald, J.]

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RE ALBERTA AND GREAT WATERWAYS RY. CO.

*Evidence Act—Order for attendance of witnesses for purposes of inquiry by foreign tribunal—Whether commissioners appointed by the government of another province under an Act of its legislature are a court or tribunal—Constitutional law—Ultra vires.*

*Held*, 1. Commissioners appointed by the government of another province under an Act of its legislature to conduct an inquiry constitute a court or tribunal within the meaning of s. 57 of the Manitoba Evidence Act, R.S.M. 1902, c. 57, as re-enacted by 5 & 5 Edw. VII. c. 11, and an order may be made under that section at the request of such commissioners requiring the attendance of witnesses in Manitoba to testify as to matters within the scope of the commission.

2. If there is nothing to prevent such commissioners from coming to Manitoba to take evidence, the order may properly require the attendance of such witnesses before the commissioners themselves at any place within this province named by them, as well as before an examiner appointed by them.

3. Sec. 57 of the Manitoba Evidence Act may be regarded as relating to the administration of justice in the province, also to a matter of a merely local or private nature in the province, and so it is not ultra vires of the local legislature under the B.N.A. Act, 1867.

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though it might have been in the absence of a direction for such conversion.

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11. As the widow and children of a deceased son would be entitled under the deed to a share of the estate, and so were interested in maintain the deed, they were necessary parties to the action attacking it, which therefore failed for lack of parties, notwithstanding that the executors of the will of said son had been made parties. These executors took nothing under the deed and did not represent the infant children of their testator, and therefore had been made parties unnecessarily.

*McMeans*, K.C., *Elliott and Macneill*, for plaintiff. *Aikins*, K.C., and *Dennistoun*, K.C., for defendant trustees. *Pitblado, Fullerton, O'Connor, Young, Blackwood, Chandler and Chalmers*, for the several other defendants.

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ALDONS *v.* SWANSON.

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*Principal and agent—Revocation of agency—Work done before revocation—Commission on sale of land—Quantum meruit—Distinction between power to revoke authority and right to do so.*

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*Ferguson*, K.C., and *Collinson*, for plaintiffs. *Nason* and *Thomas*, for defendants.

Macdonald, J.]

[May 3.

RE ALBERTA AND GREAT WATERWAYS RY. CO.

*Evidence Act—Order for attendance of witnesses for purposes of inquiry by foreign tribunal—Whether commissioners appointed by the government of another province under an Act of its legislature are a court or tribunal—Constitutional law—Ultra vires.*

*Held*, 1. Commissioners appointed by the government of another province under an Act of its legislature to conduct an inquiry constitute a court or tribunal within the meaning of s. 57 of the Manitoba Evidence Act, R.S.M. 1902, c. 57, as re-enacted by 5 & 5 Edw. VII. c. 11, and an order may be made under that section at the request of such commissioners requiring the attendance of witnesses in Manitoba to testify as to matters within the scope of the commission.

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ALDONS *v. SWANSON.*

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*Ferguson*, K.C., and *Collinson*, for plaintiffs. *Nason* and *Thomas*, for defendants.

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*Evidence Act—Order for attendance of witnesses for purposes of inquiry by foreign tribunal—Whether commissioners appointed by the government of another province under an Act of its legislature are a court or tribunal—Constitutional law—Ultra vires.*

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*Robson*, K.C., and *Coyne*, for witness. *Pitblado*, K.C., and *Montague*, for the commissioners.

though it might have been in the absence of a direction for such conversion.

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11. As the widow and children of a deceased son would be entitled under the deed to a share of the estate, and so were interested in maintain the deed, they were necessary parties to the action attacking it, which therefore failed for lack of parties, notwithstanding that the executors of the will of said son had been made parties. These executors took nothing under the deed and did not represent the infant children of their testator, and therefore had been made parties unnecessarily.

*McMeans*, K.C., *Elliott and Macneill*, for plaintiff. *Aikins*, K.C., and *Dennistoun*, K.C., for defendant trustees. *Pitblado, Fullerton, O'Connor, Young, Blackwood, Chandler and Chalmers*, for the several other defendants.

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Metcalfe, J.]

ALDONS *v.* SWANSON.

[April 29.

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Although the principal may have power to revoke the authority given to the agent, he has not always the right to do so without liability for damages.

*Ferguson*, K.C., and *Collinson*, for plaintiffs. *Nason* and *Thomas*, for defendants.

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Macdonald, J.]

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*Evidence Act—Order for attendance of witnesses for purposes of inquiry by foreign tribunal—Whether commissioners appointed by the government of another province under an Act of its legislature are a court or tribunal—Constitutional law—Ultra vires.*

*Held*, 1. Commissioners appointed by the government of another province under an Act of its legislature to conduct an inquiry constitute a court or tribunal within the meaning of s. 57 of the Manitoba Evidence Act, R.S.M. 1902, c. 57, as re-enacted by 5 & 5 Edw. VII. c. 11, and an order may be made under that section at the request of such commissioners requiring the attendance of witnesses in Manitoba to testify as to matters within the scope of the commission.

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*Re Wetherall and Jones*, 4 O.R. 713, not followed.

*Robson*, K.C., and *Coyne*, for witness. *Pitblado*, K.C., and *Montague*, for the commissioners.

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Mathers, C.J.]      LONGMORE *v.* McARTHUR.      [May 4.

*Negligence—Servant against contractor and sub-contractor—Recovery of judgment in action against one a bar to subsequent action against the other—Several tort feasors—Rights.*

A workman injured in consequence of negligence of the sub-contractor by whom he was employed has the same rights against the principal contractor as he has against the sub-contractor, and he may sue either or both. *Dalton v. Angus*, 6 A.C., per Lord Blackburn, at p. 829, and *Penny v. Wimbledon* (1898), 2 Q.B. 212, (1899), 2 Q.B. 72, followed.

But, if the workman chooses to bring his action against the sub-contractor alone, the recovery of judgment in such action is a bar to a subsequent action against the contractor for the same cause of action. *Brinsmead v. Harrison*, L.R. 7 C.P., at 547, and Pollock on Torts, p. 199, followed.

*Galt*, K.C., for plaintiff. *Wilson*, K.C., for defendants.

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Metcalf, J.]      THE KING *v.* SPEED.      [May 12.

*Criminal law—Information—Amendment of, after lapse of time limited by statute—Liquor License Act—Consuming liquor in local option district—Prohibition.*

An information, under sub-s. 32 of s. 30, of 7 & 8 Edw. VII. amending the Liquor License Act, R.S.M. 1902, c. 101, for consuming liquor in territory under a local option by-law discloses no offence unless it alleges that the liquor was purchased and received from some person other than a licensee under said s. 30, and it becomes a new information if amended by adding such allegation. If such amendment is not made within thirty days from the date of the offence, the magistrate has no jurisdiction to proceed under the information and prohibition should issue to prevent him from doing so.

*Rex v. Guertin*, 19 M.R. 33, 15 C.C.C. 251, followed.

*Noble*, for applicant. *Patterson*, K.C., D.A.G., for the Crown.

## Bench and Bar.

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We note that Mr. S. A. Hutchinson, barrister-at-law, late of Huntsville, in the Province of Ontario, is now practising in Swift Current, Saskatchewan.

## United States Decisions.

**CORPORATIONS.**—Authority of General Manager: In the absence of proof as to the nature of services or powers of a corporation employee designated "General Manager," the words would simply import that he is a general executive officer for all the ordinary business of the corporation. An authority to purchase an automobile cannot be presumed. *Studebaker Bros. Co. v. R. M. Rose Co.*, 119 N.Y. Supp. 970.—Duress: Proof that the president of a corporation permitted it to execute a contract because of threats of the adverse party to criminally prosecute him and others for swindling unless the contract was executed, established a case of duress. *International Land Co. v. Farmer*, Tex. 123 S.W. 196.—Liability of Officers: While the vice-president of a corporation would be personally liable for injury to another caused by his actual fraud, such agent is not liable to third persons for negligence or nonfeasance. *Ray County Sav. Bank v. Hutton*, Mo. 123 S.W. 47.—Sale of Corporate Stock: Where a seller of corporate stock agreed unconditionally to sell it for the buyer within a year, so as to net her a certain amount, a tender of the stock to the seller for sale was unnecessary.—*Ikern v. Clark*, Iowa 123 N.W. 379.

**COPYRIGHTS.**—Assignment: An assignee's copyright of certain cartoons entitled "Buster Brown" did not give to the assignee the exclusive right to the use of the title.—*Outcault v. Lamar*, 119 N.Y. Supp. 930.

**FIRE POLICY.**—Exceptions in Policy: Where a fire policy contained an exception that the company would not be liable for loss caused by explosion of any kind unless fire ensues and in that event for the damage by fire only, a loss occurring solely from an explosion, not by a preceding fire or by an explosion which occurred from the contact of escaping natural gas with a lighted match, held within the exceptions of the policy.—*Stephens v. Fire Ass'n of Philadelphia*, Mo. 123 S.W. 63.

**FIXTURES.**—Fences: If a fence on a farm appeared to be a permanent one, a purchaser of the farm was entitled thereto, though it was erected by a tenant under an agreement with a former owner that he might remove it at the end of the term, unless the purchaser had actual notice of such agreement.—*Esther v. Burke*, Mo. 123 S.W. 72.

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**FRAUD.**—**Representation:** To enable a person injured by a false representation to sue for damages, held not necessary that the representation should have been made to him directly.—*Wells v. Western Union Telegraph Co.*, Iowa 123 N.W. 371.

**INTEREST.**—**Right to Compound Interest:** An express promise to pay compound interest included in an account stated would be a nulum pactum, and unenforceable, in absence of consideration therefor.—*Reusens v. Arkenburgh*, 119 N.Y. Supp. 821.

**LIBEL AND SLANDER.**—**Actionable Words:** The test whether a newspaper article is libellous per se is whether, to the mind of an intelligent man, the tenor of the article and the language used naturally import a criminal or disgraceful charge.—*Church v. Tribune Ass'n*, 119 N.Y. Supp. 885.

**LIFE INSURANCE.**—**Breach of Warranty:** A prior rejection of insured by another company was most material, and a false statement in respect thereto was a clear breach of his warranty as to the truth of statements on his application, offered as a consideration of the contract.—*Fletcher v. Bankers' Life Ins. Co. of City of New York*, 119 N.Y. Supp. 801.

**MASTER AND SERVANT.**—**Contract of Hiring:** A hiring for an indefinite term at so much per month or year is a hiring at will and may be terminated in good faith by either party at any time without incurring liability.—*Brookfield v. Drury College*, Mo. 123 S.W. 86.

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Recent numbers of the *Living Age* (Boston, U.S.A.) contain some interesting articles upon the death of the late King and His present Majesty, and the home and foreign political question affected by the change of rulers in England. The selections from the leading magazines and periodicals continue to be as good as ever. Some that may be mentioned are, Compulsory insurance against unemployment; Travel sketch east of Suez; Chinese progress; Foreign policy of the United States; A church hymnal in the first century; The rubber boom, etc. Every article is selected with care from the best magazines and reviews in England.

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## CRIMINAL LAW.

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### THE ESSENTIALS OF CRIME.

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#### I. AN ACT OF THE WILL.

1. *Generally.*
2. *Somnambulism.*
3. *Hypnotism.*

#### II. MALICE—CRIMINAL INTENTION—MENS REA.

#### III. AN ATTEMPT, OR OVERT ACT.

1. *Generally.*
2. *What amounts to an attempt.*
3. *Some of the rules for determining whether a given act is an attempt.*
4. *Acts done in contemplation of the subject.*

#### IV. THE RULE UNDER THE CRIMINAL CODE.

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Apart from the mere act itself the following factors are needed. There must be:—

##### I. AN ACT OF THE WILL.

I. *Generally.*—The crime must be an act of a man's will; *will* is not a mere wish, but an emotion of mind always succeeded by motion. It is "the power of volition; i.e., the offender must be able to 'help doing' what he does. Where it is absent, an immunity from criminal punishment will consequently arise." (Kenney's Crim. Law, p. 40.) "Volition is" (says Locke) "an act of the mind knowingly exerting that dominion it takes itself to have over any part of the man, by employing it in, or withholding it from, any particular action." "The *faculty* or *power* of *willing* must be recognized as something distinct from its *exercise*."

Though to incur responsibility by a harmful act there must be an exercise of volition, that is, the actor must will the act, yet "it is not indeed necessary that the offender should have intended to commit the particular crime which he has committed; (perhaps not even that he should have intended to commit any crime at all). In all ordinary crimes the psychological element which is thus indispensable may be fairly accurately summed up as consisting simply in 'intending to do what you know to be criminal.'"

Dr. Mercier (*Criminal Responsibility*, p. 153) in discussing the conditions of responsibility says: "To incur responsibility by a harmful act, the actor must *will* the act; *intend* the harm; *desire* primarily his own gratification. Furthermore, the act must be *unprovoked*, and the actor must *know* and appreciate the circumstances in which the act is done."

What is the rule in regard to criminal acts committed by somnambulists, and by persons under hypnotic influence?

2. *Somnambulism*.—In regard to somnambulists there would not seem to be any real volition, and therefore no criminal responsibility. "Can any one doubt," said Sir J. Stephen, "that a man who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing. . . ." (*R. v. Tolson*, 23 Q.B.D. 168, p. 187.)

"It is quite possible that acts of a highly criminal character, *per se*, might be committed in this state of the agent, which is by some thought akin to epilepsy; the practical danger to be guarded against is the ease with which it may be feigned." An instance occurred in Paris within the last few years of a mother being nearly stabbed to death by her fifteen year old son, who is believed to have committed the deed in his sleep. The mother was awakened in the night by a terrible blow on her shoulder. On starting up she saw her son bending over her with a knife in his hand. She called for help, but the youth repeatedly stabbed her and then went quietly back to his room and went to bed. The

boy, when taxed with the crime, denied that he had done it, or knew anything about it.

3. *Hypnotism*.—Continental tribunals are, it is said, already familiar with the plea that a crime was committed under the influence of post-hypnotic "suggestion," exercised by some designing person, who had induced hypnotic sleep in the offender.

The subject has been much discussed among English, American and continental jurists, but no well-authenticated case seems to have yet come before the courts either in England or the United States; some reports to the contrary have since been explained away. It is not certain as yet that "the average individual in a hypnotic state could be made to commit crimes."

It has been stated that while for a time the will and other faculties are in abeyance, they are not wholly extinguished, and if the act commanded is very repugnant to the hypnotized subject, he will not go beyond certain limits in its execution.

Medical authorities seem to agree that it is very difficult (though perhaps not impossible) to implant criminal suggestions in innocent-minded persons.

(See Crim. Law. Mag. XVIII. 1; Medico-Legal Journal XIII., 51, 239; Juridical Review III., 51; see Med. Leg. Journal XIV., 150, for the remarkable case of Czynski; Eng. Encyc. (2nd ed.) VI., 687.)

Cyc. states the law on the subject as follows: "Proof that the accused committed the offence charged when under the influence of hypnotism, so that he did not know what he was doing or was compelled to commit the offence would no doubt be a defence." (XII. 176.)<sup>1</sup>

## II. MALICE, CRIMINAL INTENTION, MENS REA.

"It is a principle of natural justice and of our law," says Lord Kenyon, "that the intent and the act must both concur to

<sup>1</sup>An interesting discussion and a closer analysis of *volition* is to be found in Professor E. C. Clark's *Analysis of Criminal Liability*, pp. 24-27, where the views of Austin and Stephen are discussed. See also Mercier's *Criminal Responsibility* (p. 29, etc.) for a consideration of Stephen's views, as to which reference may be made to Stephen's *General View* (1890), p. 68, etc. Stephen's *History of the Criminal Law*, II., p. 94, etc.

constitute the crime": *Fowler v. Padget*, 7 T.R. 509, 514. This is expressed in the maxim familiar to English lawyers for nearly 800 years, "Actus non facit reum nisi mens sit rea." This maxim is one of "Coke's Scraps of Latin," and has been the subject occasionally of remarks by judges not complimentary in tone. For example, in the case of *The Queen v. Tolson*, 23 Q.B.D. 168, it is called by Cave, J., "the somewhat uncouth maxim" (p. 181), and Stephen, J., says, "Though this phrase is in common use, I think it most unfortunate and not only likely to mislead, but actually misleading" (p. 185). "It is indeed more like the title of a treatise than a practical rule" (p. 186). "I agree with my learned brother Stephen (said Manisty, J.), in thinking that the phrases 'mens rea' and 'non est reus nisi mens sit rea' are not of much practical value, and are not only 'likely to mislead,' but are 'absolutely misleading'" (p. 201).

In his History of the Criminal Law, Sir James Stephen says:

"The maxim 'actus, etc.,' is sometimes said to be a fundamental principle of the whole criminal law, but I think that, like many other Latin sentences supposed to form part of the Roman law, the maxim not only looks more instructive than it really is, but suggests fallacies which it does not precisely state. It is frequently, though ignorantly, supposed to mean that there cannot be such a thing as *legal* guilt where there is no moral guilt, which is obviously untrue, as there is always a possibility of a conflict between law and morals. The truth is that the maxim about 'mens rea' means no more than that the definition of all or nearly all crimes contains not only an outward and visible element, but a mental element, varying according to the different nature of different crimes." (Hist. Cr. Law., II., p. 95.)

Sir James Stephen said (p. 186) that he had tried to trace the origin of the maxim, but without success. Professor Kenney in his excellent "Outlines of Criminal Law" points out that Professor Maitland has traced the use of this aphorism in England back to the "Leges Henrici Primi," V. 28, and its origin to an echo of some words of St. Augustine, who says of perjury, "ream linguam non facit nisi mens rea." Hist. Eng. Law, II. 475. (Kenney, p. 37.)

But whatever the defects of the maxim may be when critically considered, it has for centuries stood as embodying an undoubted and most cherished principle of English criminal law that, "ordinarily speaking, a crime is not committed if the mind of the person doing the act in question be innocent." (Wills, J., *R. v. Tolson*, *supra*, p. 171.)

"In all ordinary crimes the psychological element which is thus indispensable may be fairly accurately summed up as consisting simply in intending to do what you know to be criminal." (Kenney, p. 39.)

Blackstone calls it "a vicious will." It is a mental ingredient, not one of feeling, a state of mind forbidden by law; murder from the best of motives is still murder. No one can plead, in justification of his criminal act, that he intended an ultimate good. "I think the old, sound and honest maxim, that you shall not do evil that good may come, is applicable in law as well as in morals." (*Regina v. Hicklin*, L.R. 3 Q.B. 360, 372, per Cockburn, C.J.)

The terms "malice" ("a term which is truly a legal enigma," Harris, 13) and "malicious" have, on account of the difficulties connected with them been discontinued in the Code, only appearing in section 499 (4) and 963 (2).

Ordinarily, therefore, mens rea is an essential ingredient of a crime. But when the legislature expressly declares an act to be criminal, the question of intention or malice need not be considered except as affecting the quantum of punishment. A statute may be so framed as to relate to such a subject-matter and make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not.

The Legislature has power to make the bare doing of a particular act a crime, no matter how innocent from a mental point of view the doer of it may be; in such a case the doer must be held to be a criminal.

"The Legislature, within its jurisdiction, can do everything that is not naturally impossible, and is restrained by no rule, human or divine. If it be that the plaintiff acquired any rights

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—which I am far from finding—the Legislature had the power to take them away. The prohibition, ‘Thou shalt not steal’ has no legal force upon the sovereign body.” (Per Riddell, J., in *Florence v. Cobalt*, 18 O.L.R. 279.)

Ordinarily the Legislature is assumed to recognize and act upon the great fundamental principles of the common law, and must not be assumed to do otherwise unless an express intention is shown. “Whether an enactment is to be construed in this sense or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the subject-matter of the enactment, and the various circumstances that may make the one construction or the other reasonable or unreasonable.” (Per Wills, J., *Reg. v. Tolson*, supra, p. 173.)

“All circumstances must be taken into consideration which tend to shew that the one construction or the other is reasonable, and amongst such circumstances it is impossible to disregard the consequences.” (Ib., p. 175.)

In criminal law it is the ordinary rule that ignorance of fact excuses the doing of an act which, if the facts were as believed to be, would not be a wrongful act. As for example, the case of *Rex v. Levett*, Cro. Car. 538, which decided that a man who making a thrust with a rapier in a cupboard in his house where he reasonably supposed a burglar to be, killed a woman who was not a burglar, was held not to be guilty of manslaughter, “for he did it ignorantly without intention of hurt to the said woman.”

Ordinarily a statute making a particular act a crime would, *prima facie*, be supposed to be based upon that general principle. The following cases illustrate these propositions. (a) By the Licensing Act, 1872 (English), a publican is liable for a penalty if he “supplies any liquor or refreshment, whether by way of gift or sale, to any constable on duty.” In *Sherras v. De Rutzen* (1895), 1 Q.B. 918, the appellant, Sherras, had been convicted under this statute, because a constable, at that time on duty, but who had removed his armlet prior to entering the appellant’s

house, had been served with liquor by the appellant's daughter in the presence of her father. He was known to them as a policeman, but they made no enquiry as to whether he was on duty or not, and took it for granted in consequence of his armlet being off that he was off duty, and served him with liquor under such belief. It was held that the conviction must be quashed. "The guilty mind which is necessary, except in a few special cases, to constitute a criminal offence was absent." (Day, J.)

"In a criminal matter there must be 'mens rea,' unless it be displaced by statute or by the nature of the subject-matter. A man, for instance, may be guilty of bigamy without 'mens rea.' So also where a criminal prosecution is for a civil wrong, as a prosecution for trespass in pursuit of game. Express words in a statute dispense with a guilty intention." (Wright, J.)

(b) In *Derbyshire v. Houlston* (1897), 1 Q.B. 772, the appellant was charged, under the Sale of Food and Drugs Act, 1875, with giving a false warranty in writing to a purchaser in respect of an article of food sold by the appellant.

When the appellant sold the article he did not know and had no reason to believe, that the warranty was false. Held, that he was not liable to be convicted.

"Where it is sought to be shewn that the Legislature means to punish without requiring proof of moral guilt, such an intention must be very clearly expressed." (Hawkins, J., p. 776.)

"The general rule is that a presumption exists that mens rea is essential to every criminal offence. There are instances in which it has been held that this presumption is displaced by the words of the statute creating the offence, but where this is the case the intention must be clearly expressed." (Wright, J., p. 776.)

(c) In *Reg. v. Sleep*, 8 Cox C.C. 472, the prisoner had possession of government stores some of which were marked with the broad arrow. He was indicted under a statute which made it a criminal offence for any person to have stores or goods so marked in his "custody, possession or keeping." The jury in answer to a question whether the prisoner knew that the copper

or any part of it was marked, answered, "We have not sufficient evidence before us to shew that he knew it." Held, that it was necessary for the prosecution to shew affirmatively a possession by defendant with knowledge that the stores were marked with the broad arrow. Cockburn, C.J., said: "Actus non facit reum nisi mens sit rea is the foundation of all criminal procedure. The ordinary principle that there must be a guilty mind to constitute a guilty act applies to this case and must be imported into this statute. It is true that the statute says nothing about knowledge, but this must be imported into the statute."

These cases are illustrations of the general rule of law, but this rule is not inflexible as will be seen from the following examples.

(a) *Reg. v. Bishop*, 5 Q.B.D. 259, the defendant was indicted under a statute which made it a misdemeanour for any person to "receive two or more lunatics into any house other than a house for the time being duly licensed." Defendant advertised for patients suffering from "hysteria, nervousness and perverseness," and honestly believed, and on reasonable grounds, as the jury found, that no one of her patients was a lunatic. The learned judge directed the jury that the word "lunatic" as defined by the Act would include a person whose mind was so affected by disease that it was necessary for his own good to put him under restraint. The jury convicted the defendant. The Court of Crown Cases Reserved held that the direction of the learned judge was correct, and that the defendant's belief was immaterial. "If we were to hold that it was, the object of the statute might be frustrated." (Denman, J., p. 261.)

(b) By the Customs Act (R.S.C. c. 32, s. 25) the master of every vessel entering any port in Canada shall go, without delay, when such vessel is anchored or moored, to the custom house of the port where he arrives, and there make a report . . . of every package or parcel of goods on board," etc.

By s. 28: If any goods are unladen from any vessel before such report is made, the master shall incur a penalty of \$400, and the vessel may be detained until such penalty is paid.

The plaintiff, the master and owner of a schooner, before reporting, sent three shirts ashore to his home to be washed, and the person who took them, also took with them from the master's trunk, without his knowledge, some worthless samples of wall paper. It was held (two judges dissenting) that the plaintiff was guilty of an offence under s. 28, and that the defendant, the collector of customs, was justified in seizing the schooner to enforce the penalty. The taking ashore by a seaman, without the master's knowledge of part of his clothing and bedding, subjects the master to the penalty under the section.

"It is clear from the whole statute that the object of the Legislature was to prevent the unloading, from a ship, of any article, however insignificant in value, or common in appearance, until a report shall have been made at the custom house. Until this has been done, nothing can be legally removed, except what is necessary to make an entry. Here there is no obscurity. No words can be plainer. There is no ambiguity here and no question of interpretation ought to arise. Even if it seems absurd to arrest a ship, because three soiled shirts, some clothing and samples of wall paper were taken ashore before a report was made, this court must construe the statute according to its true meaning, though such construction leads to an absurdity. It is laid down that, with few exceptions a guilty mind is an essential element in a breach of a criminal or penal law. It seems to me that under this statute the question of intention is not an essential element. It is to be gathered from all the penal clauses that there may be liability without the offender knowing that he was committing an offence" (Tuck, J., 614-615, in *Dickson v. Stevens*, 31 N.B.R. 611.)

(c) In *Rex v. Chisholm*, 14 O.L.R. 183, in which the defendant sought to quash a conviction under a by-law for selling bread under weight, it was argued that there was no evidence of mens rea. Riddell, J., said: "I do not think that mens rea is essential. This must depend upon the wording and object of the enactment. There is no doubt that it is competent for any legislative authority to legislate in a matter within its jurisdiction in such a

way as to make the existence of any state of mind of the perpetrator immaterial: *Bank of New South Wales v. Piper* (1897). A.C. 383, at p. 389. In the present enactment we have no such words as "knowingly," "wilfully," etc. This being the case, such decisions as *Sherras v. De Rutzen* (1895) 1 Q.B. 918, shew that there are many cases in which there is no necessity of mens rea. In the last named report Mr. Justice Wright, at p. 922, gives instances in which this is the case, amongst them 'a class of cases which are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty.' The present comes within that category."

(d) The last illustration is the "elaborately considered case of *Reg. v. Prince*, L.R. 2 C.C.R. 154, which deserves the most careful attention of the student." (Kenney, p. 41.) The discussion in this case was as to what degree of mens rea was sufficient, e.g., an intention to commit some act that is wrong, even though it do not amount to a crime; and further, as to what standard of right and wrong is to be referred to—must the intended act be a breach of law, or will it be sufficient that the accepted rules of morality forbid it? (Kenney, p. 41.) The prisoner was tried upon the charge of having unlawfully taken an unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father. He was found guilty. All the facts necessary to support a conviction existed, unless the following facts constituted a defence. The girl, though proved by her father to be fourteen years old on the 6th April following, looked very much older than sixteen, and the jury found upon reasonable evidence that before the defendant took her away he had told him that she was eighteen, and that the defendant bona fide believed that statement, and that such belief was reasonable. All the sixteen judges, except Brett, J., concurred, though not for identical reasons, in affirming the conviction. It was held by Brett, J., that to constitute criminal mens rea there must always be an intent to commit some criminal offence. "The majority of the court, however, decided that, upon the construction of the particular statute under which the prisoner was indicted, his

conduct was not excused by the fact that he did not know, and had no reasonable grounds for supposing, that he was committing any crime at all. But here their agreement ended. One of them, Denman, J., was clearly of opinion that an intention to do anything that was legally wrong at all, even though it might be no crime, but only a tort, would be a sufficient mens rea (p. 179). And seven other judges (including Bramwell, B.) appear to have gone still further, and taken a third view, according to which there is a sufficient mens rea wherever there is an intention to do anything that is morally wrong, even though it be quite innocent legally. If this opinion be correct, the rule as to mens rea will simply be that any man who does any act which he knows to be immoral, must take the risk of its turning out, in fact, to be also criminal." (Kenney, pp. 41, 42.) But such a doctrine, says Dr. Kenney, must be considered highly questionable.

The ratio decidendi of that case, it has been said, rested largely upon the fact, that although there was an absence of the mens rea in the taking so far as the age of the girl was concerned, a wrongful act was done in the taking of the girl out of the lawful possession of her parent without the colour of excuse, and the prisoner took the risk of the ulterior consequences when he did that wrongful act.

The doctrine of mens rea has been the subject of much discussion in regard to bigamy, the leading case being *Reg. v. Tolson* (*supra*). The jury, in convicting the prisoner, stated in answer to a question put by the judge that they thought she (the prisoner) in good faith and on reasonable grounds believed her husband to be dead at the time of the second marriage. The court quashed the conviction in view of this finding, nine judges being of opinion that the conviction was wrong, while five held it to have been right.

The rule in Tolson's case has been adopted by the Criminal Code, s. 307 (3a).

In *Rex v. Brinkley*, 14 O.L.R. 434, a prosecution for bigamy, one of the grounds of defence was the fact that the wife of the defendant had obtained a divorce in the State of Michigan, under

circumstances which would prevent its being considered valid in our courts. Before the second marriage the defendant had procured a copy of this decree of divorce and had also obtained legal advice that the decree was legal and binding and that he was at liberty to marry again if he saw fit. It was argued on his behalf that these facts constituted a defence on the ground that an absence of guilty intent or mens rea was thereby established, but the Court of Appeal held otherwise. Osler, J.A., said: "Sub-section 3 (c) contains no exception in favour of a person who bona fide believes, or is advised, that the bond of marriage has been dissolved by a divorce; and this, with the express enactment as to what the act of bigamy consists in, is strong to shew that no such exception is to be implied, and that a valid divorce must be proved by the accused. That may well have been intended on grounds of public policy to prevent persons from setting up divorces 'while you wait,' which to common knowledge are so easily obtained in some of the courts of the neighbouring country."

### III. AN ATTEMPT OR OVERT ACT.

1. *Generally*.—But intention alone is never a crime, except in treason where "the crime seems to consist in a mere state of mind," the traitorous intent is the gist. But even here some "overt act" is necessary. (Crim. Code, s. 74.)

"That in treason, just as in all other crimes, a mens rea will not constitute guilt without an actus reus, is vividly shewn by a Transatlantic decision that an American citizen who meant to join the hostile British forces, but found that he had by mistake attached himself to a party of United States troops could not be convicted of treason." *Commonwealth v. Malin*, 1 Dallas 33.

An intention to violate the law, so long as it remains in mere contemplation, is not cognizable under the criminal law; and the person so entertaining it cannot be punished by human tribunals. "No temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than they are demonstrated by outward actions, it therefore cannot punish for what it cannot

know." In the quaint language of Brian, C.J.: "It is trite learning that the thought of man is not triable, for the devil himself knows not the thought of man." (Year Book, 17 ed., IV. 1.) But, as Dr. Kenney says: "In ethics, of course this mental condition of intention ('a vicious will') would of itself suffice to constitute guilt. Hence on Garrick's declaring that whenever he acted Richard III. he felt like a murderer, Dr. Johnson, as a moral philosopher retorted, 'then you ought to be hanged whenever you act it.' But there is no such searching severity in the rules of law. They, whether civil or even criminal, never inflict penalties upon mere internal feeling, when it has produced no result in external conduct.

"So a merely mental condition is practically never made a crime. If a man takes an umbrella from a stand at a club, meaning to steal it, but finds that it is his own, he commits no crime." (Kenney, pp. 37-38.)

2. *What amounts to an attempt.*—There must, therefore, be something in the nature of an actual effort to carry the wrongful purpose into execution, an endeavour to commit the crime, but falling short of execution of the ultimate design; this is an attempt. It consists of some physical act which helps and helps in a sufficiently "proximate" degree towards carrying out the crime contemplated.

"The law as to what amounts to an attempt is of necessity vague. It has been said in various forms that the act must be closely connected with the actual commission of the offence, but no distinct line upon the subject has been or as I should suppose can be drawn. Some decisions have gone a long way towards treating preparation to commit a crime as an attempt. For instance, the procuring of dies for coining bad money has been treated as an attempt to coin bad money." (Stephen's Hist. Crim. Law, II., 224.)

In truth it is impossible to lay down any abstract test for determining whether an act is sufficient proximate to be considered an "attempt."

At common law every attempt to commit any crime, is itself a misdemeanour. *Reg. v. Hensler*, 11 Cox. 570.

3. *Some of the rules determining whether a given act is an attempt.*—The numerous decisions on this subject shew the impossibility of laying down any test to suit all cases.

One proposition in the nature of a rule was laid down by Lord Blackburn (then Blackburn, J.). in *Reg. v. Cheeseman*, Leigh and Cave, 140, as follows: "There is, no doubt, a difference between the preparation antecedent to the offence and the actual attempt. But, if the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the offence." In this case the prisoner was charged with an attempt to steal a quantity of meat belonging to a contractor, who supplied meat to a military camp, whose servant he was. The prisoner and the quartermaster-sergeant proceeded to weigh out the meat to the different messes with the quartermaster-sergeant's weights, the prisoner being the person who put the weights on the scale. Before the weighing was complete, one of the messmen brought back his mess portion, with a complaint that it was short weight. It was discovered that the 14-lb. weight belonging to the quartermaster-sergeant had been removed, and concealed under a bench; and that a false 14-lb. weight had been substituted for it, and used in weighing out the thirty-four messes; and that the prisoner had absconded on the commencement of the investigation. The jury found in answer to questions that the prisoner had fraudulently substituted the false weight for the true one with intent to cheat; that his intention was to carry away and steal the surplus meat remaining after the false weighing: and that nothing remained to be done on his part, to complete the scheme, except to carry away and dispose of the meat, which he would have done had the fraud not been detected. The court were of opinion that the conviction for an attempt was correct.

The rule above referred to may be serviceable in some particular cases, as, for example, such a case as *Queen v. Collins*, 33 L.J. (M.C.) 177, where it was held that putting one's hand into another's pocket, with intent to steal, there being nothing in the pocket to steal, is not an attempt to steal, because though the

party was not interrupted, yet the crime of stealing could not have been completed for want of an object upon or in respect to which it could be committed.

This decision has been overruled and held to be no longer law in *Queen v. Ring*, 61 L.J.R. (M.C.) 116, where the prisoners were held to have been rightly convicted of an attempt to steal from unknown women at a railway station, although there was no evidence that there was anything in the pocket of the women; no one having been in communication with them. It is now settled law both in England and Canada that an attempt may be criminal though accomplishment was impossible in the nature of things. (See now Crim. Code, s. 72, to be hereafter considered.) But it is manifest that many cases might occur in which, if the party were not interrupted, he would in all probability complete the contemplated offence, and yet that fact will not enable us in the least to decide whether the particular act he has done amounts to an attempt or not. For example, it would seem that where a man bought matches with intent to commit arson that act was not an attempt; it was an ambiguous act, and yet it would at that stage be quite impossible to say that if not interrupted he would not have completed the crime. He would be just as likely to complete it as not. See as to this the charge of the Chief Baron in the case of *Regina v. Taylor*, 1 F. & F. 511.

Prisoner was refused work; became very abusive, and threatened to "burn up" prosecutor. He was watched by prosecutor and his servant, was seen to go to a neighbouring stack and kneeling down close to it, to strike a lucifer match; but discovering that he was watched, he blew out the match, and went away. No part of the stack was burnt. The Chief Baron told the jury that if they thought the prisoner intended to set fire to the stack, and that he would have done so had he not been interrupted, in his opinion this was in law a sufficient attempt to set fire to the stack.

That it was clear that every act committed by a person with the view of committing the felonies mentioned (in the statute)

was not within the statute; as, *e.g.*, buying a box of lucifer matches with intent to set fire to a house.

The act must be one immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution.

Sir James Stephen says, in reference to this case: "It has been held in one case that an attempt to commit a crime is not the less an offence because the offender voluntarily desists. This, however, rests upon the decision of a single judge." (Hist. Cr. Law, II., p. 225.)

He says further (p. 226) in regard to the principle involved: "It is not easy to say upon grounds of expediency whether it is or is not wise to lay down the rule that an attempt from which a man voluntarily desists is no crime. It would be dangerous to lay down such a rule universally. Suppose, for instance, a man voluntarily desisted from an intended and attempted murder, robbery, or rape, because he encountered more resistance than he expected, or suppose that, having lighted a match to blow up a mine under a house, or to set a stack-yard on fire he blew it out because he was or thought he was discovered?"

If, however, it were said that an act will not be deemed an attempt unless it be sufficiently near to the decisive moment to enable it to be known whether the proceedings of the party will or will not result in the completion of his object; if that were the law, the rule in question would be most valuable, even if it did not furnish a decisive test. But this is shewn not to be the law by the cases in which acts quite as incipient in their character as the purchase of the matches have been held to be attempts. For instance, in *Reg. v. Roberts*, Dearsley C.C. 64, 25 L.J.M.C. 17, the prisoner bought dies for coining, in England, which he intended to send to South America for the purpose of making counterfeit money in Peru. Before sending them away he intended to make a few coins in England in order to test the dies, and ascertain if they would answer the purpose. The dies alone would not enable him to do this. There were other appliances

necessary which he had not yet bought. Yet the buying of the dies was held to be an attempt to commit in England the offence of making counterfeit coins. Here, of course, there was no more and no less reason to suppose that the party, if not interrupted, would complete the offence intended than there was in the case of the matches. It was too soon to foretell. The question was not discussed; the discussion turned entirely on the question whether the act was or was not sufficiently connected with the object the defendant had in view.

The following case well illustrates the difficulties that arise in questions of this kind. The act of buying indecent pictures for the purpose of circulating them in violation of an Act of Parliament was held an attempt to violate the statute, but the fact of the defendant having such pictures in his possession with a similar intent was held not to amount to an attempt. *Dugdale v. The Queen*, Dearsley's C.C. I., 64. Merely to preserve such a book even with a view to publish it, is not an attempt at publication; but procuring such a book with intent to publish it, would amount to an attempt. (Kenney's Cr. Law, 81.)

How near to success the attempt must come is obviously a question of degree to be determined in each case upon the special facts of the case. Attempts have been made, as has already been seen, to find a legal test to satisfy this question. It has been suggested, for instance, that to be punishable an attempt must be the last act before success; there must remain no locus pœnitentiae. But while such a formula may sometimes furnish a useful suggestion for determining the question, it cannot properly be regarded as a legal rule. As Holmes, C.J., said in *Commonwealth v. Peaslee*, 177 Mass. 267, 272: "That an overt act, though coupled with an intent to commit the crime, commonly is not punishable if further acts are contemplated as needful, is expressed in the familiar rule that preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation becomes very near to the accomplishment of the act the intent to complete it renders the crime so probable that the act will be a misdemeanour, although

there is still a locus paenitentiae, in the need of a further exertion of the will to complete the crime."

In fact literal adherence to the rule suggested would probably prevent punishment in most cases charged as attempts, since the final act before complete success will seldom be accomplished without success following. Most decided cases of attempt, it will be found, are far from being the last before complete success.

The same general doctrine has been put in other forms. Thus it has been laid down that to be a punishable attempt the defendant's act, unless interrupted by natural causes outside his control, should necessarily result in the criminal act. "Unless the transaction had been interrupted as it was, the prisoner would have actually carried away the meat." (Blackburn, J., in *R. v. Cheeseman*, 31 L.J.M.C. 89, 90 (*supra*)).

But this arbitrary rule must also be dismissed. Indeed, all the cases where a man is punished for attempt, though he repented and gave up his project before success are opposed to the proposed test. See, for example, *Reg. v. Goodman*, 22 U.C.C.P. 338.

A. was charged with attempting to set fire to a building, a dwelling house, and B. with inciting and hiring him to commit the offence.

Under B.'s directions, A. had arranged and placed pieces of blanket saturated with coal oil against the doors and sides of the house, had lighted a match, which he held in his fingers till it was burning well, and had then put the light down close to the saturated blanket with the intention of setting the house on fire; but just before the flame touched the blanket the light went out, and he threw the match away without making any further attempt. It was held that the attempt was complete.

Hagarty, C.J., said: "The fact of Waters going away, or ceasing further action after the match went out (not by any act or will of his) seems to put the matter just as if he had been interrupted, or was seized by a peace officer at the moment. It seems to me the attempt was complete, as an attempt, at that moment, and no change of mind or intention on prisoner's

part, can alter its character. It would be a reproach to the law if such acts as were here proved do not constitute an overt act towards the commission of arson."

4. *Acts done in contemplation of the object.*—When the intention to commit a crime is formed, there are two sets of acts which may be done in contemplation of the object.

(1) Preparatory Acts. For example, as was said in argument in *Reg. v. Cheeseman* (*supra*) : "There is a marked difference between attempting to attain an object and the mere doing an act with intent to attain that object. A man may do an act with intent to commit some crime anywhere; for example, a man may buy a rifle in America with intent to shoot a man in England; but the buying the rifle could not be construed into an attempt to shoot the man. Again if a notorious burglar is seen to put a pick-lock key into a door, the jury may assume that he is attempting to break into the house. But, if he were found purchasing a picklock key ten miles from the house in question, it would be impossible, without further evidence, to say that it was bought with intent to break into that house." To this it was said by Blackburn, J.: "There is no doubt a difference between the preparation antecedent to the offence, and the actual attempt."

"Preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement towards the commission after the preparations are made." Field, C.J., *People v. Murray*, 14 Cal. 159.

In the case of a man contemplating murder, the going to the place at a distance where the crime is to be committed is merely a preliminary act, no part of the crime, and does not constitute an attempt. It is merely placing himself in a position where he can commence proceedings. The buying of a revolver before going would be another preliminary step, of no particular significance to one not aware of the intent; it would not be an attempt, being too remote from the actual offence.

(2) Those acts which form successive steps in the commission of the crime, after the preliminaries are over, any one of these will be an attempt. Purchasing a revolver and going to the

place where the crime is to be committed, is a preliminary or preparatory act, as we have seen. But discharging a revolver at the intended victim and missing him would seem certainly to be an attempt. But how far back does this class of acts go? Would loading in the sight of the intended victim be an attempt if not followed up by any further step? or aiming, and stopping there in consequence of the person aimed at suddenly turning into a shop?

We must separate the act in question from all acts that follow or that might follow in order to decide whether the particular act is an attempt or not. "As the aim of the law is not to punish sins, but is to prevent certain external results, the act done must come pretty near to accomplishing that result before the law will notice it. But it is not necessary that the act should be such as inevitably to accomplish the crime by the operation of natural forces, but for some casual and unexpected interference. It is none the less an attempt to shoot a man that the pistol which is fired at his head, was not aimed straight, and therefore, in the course of nature, could not hit him. Usually acts which are expected to bring about the end without further interference on the part of the criminal are near enough, unless the expectation is very absurd. Every question of proximity must be determined by its own circumstances and analogy is too imperfect to give much help." Holmes, J., in *Commonwealth v. Kennedy*, 170 Mass. 18, 20.

In the recent case of *Rex v. Linneker* (1906), 2 K.B. 99, it was held that the accused was rightly convicted of "feloniously attempting to discharge a revolver with intent to do grievous bodily harm" (see Criminal Code, s. 273), when he had drawn a loaded revolver from his pocket, saying to the prosecutor, "you've got to die." The prosecutor seized him and prevented him from raising his arm. During the struggle these words were said several times to the prosecutor who finally wrested the revolver from the prisoner and he was taken into custody. This was held to come under the definition in Stephen's Digest of the Criminal Law: "An attempt to commit a crime is an act done

with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted."

"It is not enough that there should be an intention or a preparation to discharge the weapon; there must be an attempt to do so." (Alverstone, L.C.J., p. 102.)

"Although an attempt implies the intent, an intent does not necessarily imply an attempt. There may be cases very near the line as regards the attempt, although there is no doubt as to the intent. It is always necessary that the attempt should be evidenced by some overt act forming part of a series of acts which, if not interrupted, would end in the commission of the actual offence." (Kennedy, J., p. 103; see also *Reg. v. Lewis*, 9 C. & P. 523, and *Reg. v. Jackson*, 17 Cox C.C. 104.)

The following further cases may, perhaps, well be noticed.

In *Reg. v. Maddock* (reported in the *Solicitors' Journal*, 12th May, 1900, p. 444) the defendant was indicted for attempting to commit arson. It was proved that he had placed a quantity of inflammable substances on the floor of a certain house, saturated them with methylated spirits, and placed a freshly trimmed candle in the midst. Not having lighted the candle, it was argued on motion to quash the indictment, that the prisoner had merely made preparations to commit a felony and had not gone far enough in his acts to constitute an attempt in law.

Lawrance, J., held, that as something remained to be done by the prisoner, and there was no interruption, that what he did, did not amount to an attempt at law.

One cannot be convicted of an attempt to enter and break a dwelling merely because he agrees with another to do so, meets him at a saloon at the appointed time, with a revolver and slippers to be used in the house, and goes into a drug store and purchases some chloroform to use, being arrested when he comes out. *People v. Youngs*, 50 Cent. L.J. 69. See also *Reg. v. McCann*, 28 U.C.R. 514.

The provision of the Criminal Code (s. 72) is as follows:—  
"Everyone who, having an intent to commit an offence, does or

omits an act for the purpose of accomplishing his object is guilty of an attempt to commit the offence intended whether under the circumstances it was possible to commit such offence or not.

"2. The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law."

It will be noticed that the first part of the section embodies the law as laid down in *Reg. v. Ring* (*supra*). Clause 2 leaves it as a matter of law to the judge to say whether the act in question is or is not an attempt. This is in accordance with Sir James Stephen's view, but is opposed to that of Professor Clark, who says (p. 17) : "The question would seem to me, in English law, one for a jury."

Some curious results would seem to follow from the present state of the law; the following were suggested by a distinguished member of the English Judiciary. Suppose a person should, in the dusk of the evening, fire off a gun or pistol as he supposed at A., whom he thought he saw standing in a particular spot and whom he intended to kill, when in fact no person was anywhere near, and the object aimed at was in reality a tree or some other object. Under the common law decisions such as *Reg. v. Collins* (*supra*) and *Reg. v. McPherson*, D. & R. 197, this would not be deemed an attempt to murder or shoot A. It would seem, however, to be so under the Code. So if A. were to shoot at B., believing him to be C., and with intent to shoot and kill C., at common law A. could be convicted of an attempt to murder B. because he intended to kill B., so intending, it is true, because he believed him to be C. In other words, he intended, and therefore attempted, to kill the man he aimed at. But that man was B.; therefore he intended and attempted to kill B., doing so because he believed him to be C. He could not be convicted of an attempt to murder C. because this was impossible at the time. But under the Code the fact that it was impossible to kill C. because he was not there is not to prevent the party from being

convicted of an attempt to kill him. The question may arise, can A. be convicted of an attempt to murder them both?

In the *Solicitors' Journal*, 20th June, 1903, p. 596, the following illustration of the present law in regard to an attempt to do what is impossible is in point. It is there said:—

"A recent case of considerable interest to lawyers is reported from the United States. It was proved that the prisoner, with the intention of killing the prosecutor, had fired through a bedroom at the bed upon which he supposed the prosecutor to be sleeping. As a matter of fact, the bed was unoccupied, and the intended victim was in another part of the house. It was held, however, that the prisoner was rightly convicted of an attempted murder.

"Before *Reg. v. Ring*, 17 Cox C.C. 491, this would not have been in accordance with the law as accepted here. In the present case, the prisoner had done everything in his power to murder the prosecutor; he supposed him to be in the bed and sent bullets through the bed; and he would probably have succeeded in the murder which he contemplated but for the absence of the intended victim."

A similar question to the one arising under s. 72 is discussed in an interesting article on Criminal Attempts in the *Harvard Law Review* (vol. 16, p. 491). The writer says that it is quite true that in the ordinary use of language a man attempts to bring about results as well as to do acts, and that when a murderer in intention fires a pistol he is attempting not only to put a bullet into the object aimed at, but to cause the death of his intended victim, who may be a hundred miles away. But attempt in that sense, having a merely mental connection with the intended result, is not the concern of the criminal law, which punishes physical acts only. The important question is, what is the physical act which the defendant has set out to do; for to bring about a harmless physical result in the vain hope of effecting a crime is not criminal, an attempt which is to form the subject of a criminal inquiry must therefore be a step towards a forbidden physical act. If the entire physical act which the accused has at the

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time set out to perform might be accomplished without committing a substantive crime, the attempt, not being an actual step towards a criminal act, cannot be criminal. If then the criminal act intended is not a crime, the attempt to do it cannot be criminal. This principle may be made clearer by a few illustrations. The defendant wishing to kill an enemy shoots towards an imperfectly seen object which he believes to be his enemy. The object proves to be an animal or a stump. Whether the bullet misses its mark or hits it, the act is not criminal, for the thing which the actor aims to do is to bring his bullet into violent contact with the object seen. If he does so, he commits no crime; if he attempts to do so he equally commits no crime. It is immaterial that his ultimate purpose is to have his enemy die.

N. W. HOYLES.

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#### *IMMIGRATION.*

Our attention has been called to a subject which, though not strictly within our province, is yet one of great national importance. We refer to the alleged cases of hardship to individuals through the administration of the law and regulations respecting immigration which have caused much unfavourable comment in quarters where it is very desirable that no unkind feeling should exist. We do not propose to criticise the details of the immigration policy adopted by the Government, which are, no doubt, the result of very careful consideration, and intended to promote the welfare of the immigrants themselves, as well as the best interests of the country at large.

But there is one fact which, in our present condition of self-sufficiency, we are apt to lose sight of altogether, though it has an important bearing upon this subject of immigration. We must not forget that Canada is a part of the British Empire, and that it became such not at our expense, and not through any effort of ours. It was British blood and British treasure that gained this land for the British races, and its soil is therefore free

to any British subject, no matter where he comes from, and to that consideration all regulations regarding immigration must be subservient. We repeat that, as Canadians, we have no more right to the soil of this country than have any other British subjects. We use no legal fiction in calling our unoccupied lands Crown lands. The term exactly expresses the fact, and we cannot ignore it, and should not try to do so. The fee simple of the land is in the Crown, and all that any of us as Canadians is entitled to is the usufruct of such portions of it as have been ceded to us by the Crown which represents the common interest of all its subjects. The Government of this country has been entrusted by Imperial authority with the control of that property, but not with any exclusive right to it, and must exercise that control with due regard to the conditions under which it was granted.

Having said this much by way of protest against false ideas which seem to prevail in some quarters, but which have a practical bearing upon the question under consideration, we return to the complaints which have been made not, as we understand, to the regulations themselves, but to the spirit in which they have sometimes been administered. One of the most important of these regulations is that which requires every immigrant, with certain exceptions, to have in their possession on landing the sum of \$25. We quite admit that some rule is necessary to prevent an influx of paupers, or of men and women who could not properly be so designated, but who, not secure of obtaining immediate employment, would find themselves in landing in a state of destitution, and dependent upon charity.

But such a rule should be carried out with caution and discrimination. It should not apply to wives or children coming out to join husbands or parents able to maintain them, nor to any class of persons who can shew that they have immediate work provided for them. In both such cases it has been applied, as reported, so as to cause hardship and suffering. It must also be the case in many instances that men and women with families, very desirable as immigrants, could only with great difficulty, and

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with much self-denial, gather together money enough to pay the cost of transportation, and then to be required to have such an additional sum to meet possible contingencies is absolutely to prohibit their coming, and perhaps throw them into that condition of pauperism so much to be deprecated. We say then, that admitting the necessity for such a rule, it is one that should be administered with great care, and in a spirit of charity rather than of repulsion.

The second rule to which exception is taken, limiting a certain class of assisted emigrants to those only who are willing to accept farm work, opens a wide field for discussion.

We are in this regulation immediately brought into contact with the instincts of trades unions with all their political influence, and their desire to check competition that might lower the standard of wages. Why the laws of supply and demand which, in the long run, regulate all such matters, should apply only to farm labourers, and not to mechanics and skilled labour of all kinds, is a subject upon which it is not our business to enter. We recognize that caution should be taken to discourage the incoming of men for whom no employment can be found, but the rule should be of general application, and not operated in the interests of a particular class, and without regard to the varied and varying interests of the whole community.

In conclusion, this immigration question is an Imperial one and should be treated Imperially. It is part of the Imperial burden to provide for Imperial needs, and not the least of them is to see that the resources of the Empire are made available for all Imperial subjects, and this can best be done if all parts of the Empire, especially those so richly endowed as ours, are willing to take their burdens along with their inheritance, and deal with them according to the golden rule of doing to others as we would they should do to us. This is not cant, this is not mere sentimentality. It is right, not only from a moral point of view, but also is the best way to promote our own interests, both material and social.

*REVISION OF THE ONTARIO STATUTES.*

The revision of the statutes at the present rate of progress bids fair to be a lengthy process. It has already been in progress over three years, but only part of the statutes in volume one of the Revised Statutes of Ontario, 1897, have yet been revised. In the meantime a very large part of the statutes in volume one have been repealed, and the current law has now to be sought in other volumes. For the purpose of shewing where the statutes as revised are to be found, we have compiled a table of the revised statutes, which appears in another place (post, p. 429). We trust it will be found useful for reference.

We find that there are about 64 chapters in volume one, 311 in volume two, and 19 in volume three, besides a multitude of other statutes scattered through the fourteen volumes of statute issued since 1897, to the present time, yet remaining to be revised, to say nothing of others which may come into existence before the revision is completed.

In a previous number (*ante*, p. 233), Mr. E. F. B. Johnston, K.C., gave his views at length on the art of cross-examination. A book written by Francis S. Wellman, of the United States Bar, recently published by the McMillan Company, deals with the same subject. In one of the chapters the learned author discusses the art in reference to direct examination. The general impression prevails that the direct examination of a witness requires less skill than the cross-examination. He does not seem to feel inclined to agree with this view and regrets that so little attention is paid to examinations in chief. This results possibly from the fact that a cross-examination is more engaging to the spectators and its results are much more clearly perceived by them. The subtle arts and consummate skill of examinations in chief are, in his opinion, seldom apparent to the mere spectator, though they may well be appreciated by the lawyers engaged in the case who would be able to recognize the ingenuity and tact with which the desired facts have been elicited or the weak points suppressed or at least not clearly revealed. Space does not permit to do more than refer to this interesting book. Its perusal during vacation will be much more interesting and profitable than much that is skimmed during the "dog days."

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**REVIEW OF CURRENT ENGLISH CASES:**

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**COVENANT—COVENANTOR COVENANTING WITH HIMSELF AND OTHERS  
—RIGHT TO ENFORCE OBLIGATION.**

*Ellis v. Kerr* (1910) 1 Ch. 529 presents a curious state of facts. Walter Kerr assigned to the trustees of his marriage settlement a policy of life insurance to be held on the trusts of the settlement. The trustees of the settlement were, Butler, C. J. Kerr and Chelwynd. Walter Kerr, Butler and C. J. Kerr covenanted with the trustees of the settlement that Walter Kerr would pay the premiums necessary to keep the policy afloat, or in default Butler and Kerr would do so. Ellis was subsequently substituted as a trustee of the settlement in place of Chetwynd. Walter Kerr having made default in payment of the premium and Butler and C. J. Kerr having refused to pay, the other trustee, Ellis, brought the present action against Walter Kerr, Butler and C. J. Kerr to compel them to pay the premiums under their covenant. Warrington, J., who tried the action, held that the covenant sought to be enforced being a joint covenant made by the covenantors with two of themselves was unenforceable either at law or in equity; and, without prejudice to any other remedy the plaintiff might have, the action was dismissed.

**SETTLEMENT OF REAL ESTATE—CONDITION SUBSEQUENT, REQUIRING  
ASSUMPTION OF NAME AND ARMS—GIFT OVER ON “REFUSAL OR  
NEGLECT”—INFANT.**

*In re Edwards, Lloyd v. Boyes* (1910) 1 Ch. 541. In this case the point decided by Warrington, J., is this: that where real estate is devised by a testator in trust for an infant subject to a condition that the infant is, within six months after becoming entitled, to assume the name and arms of the testator, subject to a devise over in case of refusal or neglect to do so, there can be no forfeiture of the estate by reason of the neglect or refusal of the devisee so long as he is an infant.

**ESTATE DUTY—TESTAMENTARY EXPENSES—ORDER OF ADMINISTRATION OF ASSETS.**

*In re Pullen, Parker v. Pullen* (1910) 1 Ch. 564. The question for decision here was one as to the proper order for the

administration of assets in these circumstances. Estate duty under the Finance Act of 1894 is payable in respect of personal property specifically bequeathed by a testator, this is held to be "a testamentary expense," and as such is payable in the same order as other testamentary expenses; and accordingly it was held by Warrington, J., that where the residuary personal estate is insufficient to pay the estate duty on the specifically bequeathed personality, the heir at law is not entitled to have the duty paid out of the specifically bequeathed personality in exoneration of the undisposed of realty.

**COMPANY—WINDING UP—“CONTINGENT OR PROSPECTIVE” CREDITOR—LOCUS STANDI OF PETITIONER—(R.S.C. c. 144, ss. 2(j), 12).**

*In re British Equitable Bond & Mortgage Corporation* (1910) 1 Ch. 574 was an application for the compulsory winding up of a limited company, and an objection was taken to the locus standi of the petitioner, who was the owner of an investment bond issued by the company, under which on making certain periodical payments he would at a future date become entitled to the payment of a sum of money, and it was held by Neville, J., that he was a "contingent or prospective" creditor and as such entitled to apply. See R.S.C. c. 144, ss. 2(j), 12.

**HEIRLOOMS—DIRECTION IN WILL FOR CHATTELS TO PASS WITH REAL ESTATE—DEATH OF INFANT TENANT IN TAIL IN REMAINDER WITHOUT HAVING POSSESSION—DEVOLUTION OF CHATTELS BEQUEATHED AS HEIRLOOMS.**

*In re Parker, Parker v. Parkin* (1910) 1 Ch. 581. Certain chattels had been bequeathed to pass with a mansion house which was limited to Edward Parker for life with remainder to his first and other sons in tail. The chattels in question were directed to continue annexed to the house as long as the law would permit. The testator died in 1856 and Edward Parker went into possession and his eldest son, the first tenant in tail, predeceased him, an infant and unmarried. Edward Parker had two other sons, one of whom had attained twenty-one. Edward Parker now claimed as next of kin of his deceased eldest son to be absolutely entitled to the chattels, and Parker, J., held that he was right in his contention.

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REPORTS AND NOTES OF CASES.

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**Dominion of Canada.**

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**EXCHEQUER COURT—ADMIRALTY (N.S.).**

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Drysdale, J., Dep. Loc. Judge.]

[May 28.

**HEATER v. ANDERSON AND SHIP "ABEONA."**

*Jurisdiction—Contract made without reference or application to court—Security for return of ship.*

Where the majority owners of a ship, desiring to make use of the ship, without application to the court, execute a bond under seal to the minority owners, conditioned for the safe return of the ship to a port mentioned, or, in default, payment of a fixed money penalty, such contract is not one which the court has jurisdiction to enforce, differing in this respect from a bond executed under the same circumstances in the court, which is not a contract between the parties but is a security given to the court. *The Bagnall*, 12 Jur. 1008, followed.

*Rogers, K.C., and Stairs, for plaintiff. Chesley, K.C., and Ritchie, K.C., for defendants.*

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**Province of Ontario.**

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**COURT OF APPEAL.**

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Moss. C.J.O.] RE GOOD, ETC., COMPANY, LIMITED. [May 19.

*Appeal—Application for leave to—Question of importance—Validity of by-law preventing shareholders from transferring fully paid up shares without consent of directors.*

Application for leave to appeal to the Court of Appeal from an order of the Divisional Court requiring the company to transfer in its books five fully paid-up shares of stock as signed by one Isaac Good a shareholder to the applicant J. S. Good. The amount in controversy was less than the statutory sum of \$1,000,

but the question at issue was important as regards joint stock companies.

It had been held in this proceeding that it was beyond the power of a company incorporated under the Dominion Joint Stock Company's Act to enact a by-law preventing shareholders from transferring any of their fully paid-up shares except with the consent of the directors. The learned Chief Justice in giving judgment on the above application said that the above holding was the first express decision to that effect, though the point had been dealt with in the following cases: *In re Smith and Canada Car Co.*, 6 P.R. 107; *In re Macdonald*, 6 P.R. 309; *In re Imperial Starch Company*, 10 O.L.R. 22; *In re Panton*, 9 O.L.R. 3.

*Held*, that the question was one of so much consequence to companies that it was proper to grant leave to appeal; but, having regard to the position and rights of a proposed respondent terms were imposed as to costs.

*Lefroy*, K.C., for company. *H. S. White*, for applicant.

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## HIGH COURT OF JUSTICE.

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Britton, Teetzel, Riddell, JJ.]

[May 12.

BROWN v. CITY OF TORONTO.

*Municipal law—Negligence—Ont. Jud. Act, s. 104—Non-repair of streets—Nonfeasance and misfeasance—Jury notice.*

Appeal from order of BOYD, C., restoring plaintiff's jury notice which had been struck out by the Master in Chambers. The action was for negligence on the part of the defendants in taking up an old sidewalk and not properly repairing it, whereby the plaintiff was tripped and thrown on to the roadway and thereby injured. The question was whether the action was based on nonfeasance or misfeasance. The statute applicable to the case is s. 104 of O.J. Act, which provides that "All actions against municipal corporations for damages in respect of injuries sustained through non-repair of streets, roads or sidewalks shall be tried without a jury."

*Held*, that "non-repair" within the meaning of the above section is an abstract noun, meaning the state or condition of a street, and not a verbal noun meaning "not repairing." "Non-repair" means only the state of being out of repair, i.e., not being in repair. This being so, such state may be occasioned by mis-

feasance as well as nonfeasance and there is nothing in the statute to shew that the legislature intended to restrict the application of the word to the case of nonfeasance. Had this been their intention it would have been easy to express it clearly. The jury notice was therefore struck out.

*Bradford, K.C., for plaintiff. Howitt, for defendant.*

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Boyd, C.]                    STAVERT v. McMILLAN.                    [May 23.

*Promissory notes—Consideration—Transfer of bank shares—Illegal trafficking by bank in its own shares—Directors—Bond—Notes given to repair wrongdoing—Holder in due course—Notice of illegality.*

Action by the curator of the Sovereign Bank of Canada on a promissory note for \$33,110, made by the defendant, a director of the bank, and for interest, etc. The defendant claimed indemnity from the bank, pursuant to an alleged agreement therefor. Several other actions by the same plaintiff against different defendants were tried with this, and the judgment disposes of them all.

BOYD, C.:—That which underlies and affects the whole litigation is a series of dealings by which the money of the Sovereign Bank was used in purchasing shares of its own stock to the extent of about \$40,000. The shares so acquired stood in the names of various nominees of the bank—brokers, officers of the bank, and others—who undertook no personal responsibility and whose names were in some cases used without their knowledge. The whole transaction was managed by the then general manager, Stewart, and there is no doubt that the money was illegally withdrawn from the funds of the bank and used in violation of the statute—the Bank Act, R.S.C. 1906, c. 29, s. 76. The shares were bought to be again sold, and the plan was to keep up the price of the stock and to make possible profits. This process amounted to an illegal trafficking in the shares, was ultra vires, in disregard of the public policy forbidding banks to engage in such a line of business, and placed in jeopardy the charter of the bank. . . .

The notes . . . were given for value, represented by the transfer of shares apportioned to each, and in the whole representing in value the \$400,000 of the bank's money illegally expended.

This was, I think, the whole consideration as between the bank and the defendants; but, even if it was only a part, it is enough

to raise the next important question: in how far can an action to enforce payment be entertained by the court? . . .

We start with a transaction or series of transactions illegal in every sense. There was an unwarrantable misapplication of the bank's money, which was ultra vires, in the teeth of the Bank Act, and in violation of the public policy to be observed and maintained in the public interest. The Act says that an incorporated bank shall not, except as authorised by the Act, directly or indirectly purchase or deal in or lend money or make advances upon the security or pledge of any share of its own capital stock: s. 76 (2b). There was clearly a purchasing of shares, and the purchase was in order to their being again sold. That is a trafficking in its own shares, which is forbidden. For that, authority will be found in *Hope v. International Financial Society*, 4 Ch.D. 327, 339, and *Trevor v. Whitworth*, 12 App. Cas. 409, 417, 419, 428. The original acquisition of the shares was not merely voidable but void; it was a nullity, not to be validated by lapse of time or by any action of the bank or the shareholders. This was so held by Lord Shand in *General Property Investment Co. v. Matheson's Trustees*, 16 Rettie 282, approved by Collins, M.R., as good law in English Courts, in *Bellerby v. Rowland & Marwood's S. S. Co.*, [1902] 2 Ch. 14, 27; and to the same effect under our Bank Act by the Supreme Court of Canada in *Bank of Toronto v. Perkins*, 8 S.C.R. 603.

Then what was the transfer of these shares to the defendants, in exchange for the notes sued on, but a sale of the shares? . . .

Going back to the bond given by the directors to guarantee the payment and to take over or otherwise dispose of the stock, it could not have been enforced in any court of law or equity. The reason is succinctly given by Bramwell, B., in *Greene v. Mare*, 2 H. & C. 339, 346: "The indenture declared on was executed as a security for the payment of a debt founded on an illegal consideration, and as the debt could not be enforced against the debtor, neither can it be enforced against the person who has executed the security for its payment." The result is the same if part of the consideration is illegal, for, as said in one of the cases, where the parties (as, e.g., the bank and the directors) have woven a web of illegality, it is not part of the duty of courts to unwind the threads.

Considered as between the bank as holder and the defendants (directors and others, their friends), the case appears to be that of the bank adopting the shares bought with its own money and selling them to strangers for a price sufficient to recoup the first illegal outlay. . . .

I think the bank has not power to transfer these shares or enforce payment for them against an unwilling purchaser. The bank has no legal title to the shares, and can confer none; so that in the hands of any one having knowledge or notice of the facts or of the violation of the statute, the notes cannot be enforced by action.

This legal result of the facts indicates the practical impossibility of the bank undertaking to indemnify the defendants in regard to their having become holders of the stock. The expenditure of the bank's money was a misfeasance in the first place, and any indemnification would be an agreement further to misuse the shareholders' money.

Upon the evidence it appears that fifteen of the notes sued on required to be indorsed to the plaintiff after the 18th January, 1908, before he would acquire title thereto or become a holder in due course. . . . My conclusion is as to these fifteen notes that he had sufficient notice of the situation as between the directors and the bank as to this stock being purchased with the bank's moneys and as to the way in which the notes sued on were given.

As to these fifteen notes, the actions fail and should be dismissed; but no costs are given where the defence is illegality.

*Bicknell, K.C., and MacKelcan, for plaintiff. W. Nesbitt, K.C., Arnoldi, K.C., H. S. Osler, K.C., and J. Wood, for defendants. Hellmuth, K.C., Anglin, K.C., and Boland, for bank.*

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Middleton, J.]

RE SOLICITOR.

[May 27.

*Solicitor—Retention of client's money—Delivery of bill of costs  
—Disobedience—Retainer—Settlement—Preparation of bill  
—Attachment.*

Motion by client to attach a solicitor for disobedience to an order requiring him to deliver a bill, which order had not been moved against nor complied with. It appeared that on October 2, 1908, the solicitor received for the client as a result of the settlement of the suit \$2,600, and paid her \$625, retaining the balance presumably as costs of the litigation, but no bill had ever been delivered.

MIDDLETON, J., after referring to the facts and deciding some question in relation thereto said that the promise to pay a retainer is void: *Re Solicitor*, 14 O.L.R. 464. A retainer is a gift by the client to the solicitor, and, like all gifts, must be a voluntary act. With reference to the settlement suggested by the

copy of the cheque produced, there was no bill, and there can be no binding settlement without a bill: *Re Bayliss*, [1896] 2 Ch. 107. It is fair to assume that this retainer was a factor in the settlement, if settlement there was, and the client would not be bound by it.

As to the suggested inability of the solicitor to prepare a bill —on the material this is not proved as a fact, and, if it were, it would not afford any excuse.

Even if there had been a valid agreement, the solicitor owed a duty to his client to keep a proper record of the business done, as the preparation of a party and party bill might have been assumed to be, in the event of success, necessary in the client's interest. See *Re Ker*, 12 Beav. 390, and *Re Whiteside*, 8 Beav. 140; *Knock v. Owen*, 35 S.C.R. 168, 172. Order to go for attachment, but not to issue for two weeks.

*R. Mackey*, for applicant. *Meek, K.C.*, for solicitor.

## Province of Manitoba.

### COURT OF APPEAL.

~~File No.~~ Court.]

[June 6.

*WHITLA v. RIVERVIEW REALTY CO.*

*Re* ~~re~~ *Soldor and purchaser—Agreement for sale of land—Rescission—Specific performance—Right to recover back money paid on cancelled contract.*

p. ~~57~~ *Appeal from judgment of MACDONALD, J., noted, vol. 45, at 3, dismissed with costs. HOWELL, C.J.A., dissenting.*

### KING'S BENCH.

*Mathers, C.J.]*

*MARTIN v. BROWN.*

[May 4.

*Principal and agent—Implied obligation of agent—Improper use of information obtained during employment—Breach of confidence.*

The plaintiff, being employed as agent of the defendants on commission to procure orders in a defined territory for the pur-

chase of the defendants' goods, agreed that he would, to the best of his ability, serve their interest. He rented an office in his own name for the purposes of the business and paid the rent himself. During his employment, the plaintiff prepared a mailing list of customers and prospective customers in his own territory for use in carrying on the defendants' business, also a card index of 500 or 600 names of such customers, and he kept a ledger containing particulars of sales made for defendants. During the last three months of his employment, the plaintiff made an agreement with another firm in the same line of business as defendants to enter their service on the expiration of his then current engagement and made use of the information in his possession to the detriment of the defendants in many ways and planned to take with him to the other firm as much as possible of the business worked up by him for the defendants. The defendants, on learning of this, dismissed the plaintiff, entered his office and took away or destroyed the mailing list, card index and ledger above referred to, and also a list the plaintiff had prepared of likely calendar buyers all over Canada chiefly outside of the plaintiff's territory.

*Held.* 1. The plaintiff was entitled to damages for the trespass committed by defendants in entering his office (fixed at \$50) and for the destruction of the list of likely calendar buyers (fixed at \$250).

2. The defendants were entitled to damages on their counter-claim against the plaintiff for breach of his agreement to serve their interest to the best of his ability on account of his conduct as above stated, fixed at \$500.

3. The mailing list, card index and ledger were the property of the defendants and the plaintiff could not recover anything in respect of them. *Robb v. Green* (1895), 2 Q.B. 315, followed.

Plaintiff to have costs of suit, and defendants of their counterclaim, and judgment to be entered against party found indebted after set-off of results.

*Trueman*, for plaintiff. *Wilson, K.C.*, and *J. F. Fisher*, for defendants.

NOTE.—By accident the following line was dropped out between lines 2 and 3 on p. 387: "the husband to the wife, were held to be still her property, the."

## Book Reviews.

*The Debentures and Debenture Stock of Trading and other Companies, with Forms.* By EDWARD MANSON, Barrister-at-law. 2nd edition. London: Butterworth & Co., Temple Bar, Law Publishers. 1910.

New books giving the newest thoughts on subjects affecting the "law merchant" are always welcome; for, as Chief Justice Cockburn says in *Goodwin v. Roberts*, this branch of the law is not fixed and stereotyped, but is a living law, capable of expansion and enlargement to meet the requirements of trade in the varying circumstances in commerce. Hence the value of such a work as this. A professional man dealing in company law (and which of them does not in these days) needs the assistance and information given in this excellent compendium.

## Revised Statutes of Ontario

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" 3. (Territorial Division.)	10 Edw. VII. c. 2.
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" 64. Boundary Disputes.	10 Edw. VII. c. 33.
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" 72. Limitation.*	10 Edw. VII. c. 34.
" 73. Witnesses and Evidence.	9 Edw. VII. c. 43.
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" 94. Returns by Police Magistrates.	
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" 96. County Crown Attorneys.	

\*This Act is not repealed, but its provisions are re-enacted, except s. 4.

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" 99. Constables.	10 Edw. VII. c. 39.
" 100. Constables to take Bail.	10 Edw. VII. c. 40.
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" 122. Estates Tail.*	10 Edw. VII. c. 52.
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" 125. Short Forms of Leases.	10 Edw. VII. c. 54.
" 126. Short Forms of Mortgages.	10 Edw. VII. c. 55.
" 127. Devolution of Estates.†	10 Edw. VII. c. 56.
" 128. Wills.	10 Edw. VII. c. 57.
" 129. Investments by Trustees.	9 Edw. VII. c. 59.
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" 155. Wages of Workmen on Public Works.	10 Edw. VII. c. 71.

\*Sections 17-19 are not repealed.

†Sections 22-58 are not repealed.

‡Section 41 is not repealed.

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| 63 Vict. c. 50 and amendments.    |  |
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| 9 Edw. VII. c. 91.                |  |
| 10 Edw. VII. c. 105.              |  |
| 9 Edw. VII. c. 39, s. 2.          |  |
| 8 Edw. VII. c. 34, s. 2.          |  |
| 10 Edw. VII. c. 34.               |  |
| 9 Edw. VII. c. 39, ss. 2, 3.      |  |
| 10 Edw. VII. c. 57, s. 10.        |  |
| 10 Edw. VII. c. 52.               |  |
| 10 Edw. VII. c. 46.               |  |
| 9 Edw. VII. c. 58.                |  |
| 10 Edw. VII. c. 56, ss. 30-32.    |  |
| 10 Edw. VII. c. 31.               |  |
| 9 Edw. VII. c. 37.                |  |

\*Section 3 is not repealed.

## flotsam and jetsam.

The King, on the advice of the Secretary of State for the Home Department, who is the person held responsible in the premises, as an act of clemency granted the following remission of sentence to all convicted prisoners in the United Kingdom who on the 23rd day of May, 1910, were still to serve more than one month of their sentences for penal servitude. To those who have one month or more still to serve, one week; to those who have one year or more, one month; to those who have three years or more, two months; to those who have five years or more, three months.

# Canada Law Journal.

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VOL. XLVI.

TORONTO, JULY.

Nos. 13 & 14.

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## *MERCIER v. CAMPBELL AND THE STATUTE OF FRAUDS.*

In our issue of May 2 (ante, p. 273) we published an article written by F. P. Betts (of London, Ont.), in which he discusses the judgment of the King's Bench Division in the case of *Mercier v. Campbell*, 14 O.L.R. 639.

In the July number of the *Law Quarterly Review* (London, England, Sir Fred. Pollock, Bart., D.C.L., editor) there appears a criticism of the above judgment in which the learned editor agrees with the view expressed by Mr. Betts, and strongly dissents from the reasons given for the finding of the court. He concludes by hoping that "the doctrine in *Mercier v. Campbell* will be considered by some court of higher authority." We reproduce the article in the *Law Quarterly*. It reads as follows:—

"The CANADA LAW JOURNAL of May 2 calls attention, rather late, to the law laid down by a Divisional Court in Ontario on appeal from a County Court (whereby the decision was final) in 1907, *Mercier v. Campbell*, 14 Ont. L.R. 639. The Court appears to have decided that a liquidated damages clause annexed to an agreement subject to the Statute of Frauds is collateral and separable, and if the statute is not satisfied the agreement can nevertheless be indirectly enforced by suing for the liquidated damages assigned for its non-fulfilment.

"We agree with the learned commentator that the decision is wrong. The agreement in question was in writing and intended to be formal, but in fact inartificial amateur work. It was for the sale of real estate on a vaguely expressed condition, of which the uncertainty seems to have been the formal defect relied upon. We confess we should have thought it uncertain enough to spoil the agreement even apart from the statute. However, the agreement was in fact admitted in the Divisional Court to be not enforceable by reason of the statute, but otherwise certain enough to support an action. In the body of the same document two short

paragraphs were added to the effect (the exact words are not material) that either party refusing to perform his part of the agreement should pay the other \$300. The action was brought by the vendor to recover that sum from the purchaser for non-performance. In the County Court the judge said. (ex relatione the writer in the CANADA LAW JOURNAL) : 'This is an attempt to introduce a most startling principle. It amounts to this; that any contract within the Statute of Frauds, however informal it may be, may be the foundation of an action at law for damages, provided the parties have beforehand fixed and agreed upon what sum shall be recoverable in case of breach thereof. . . A stipulation in a contract as to liquidated damages cannot alter the nature of such damages nor indirectly validate a void agreement. Such stipulation must stand or fall with the contract itself.'

"This appears to us very sound, and we find no answer to it in the leading judgment in the Divisional Court, per Riddell, J., save the bare assertion that the promise to pay \$300 is a distinct and alternative agreement. It seemed clear to the learned judge that these reciprocal promises are severable from the body of the agreement of which, as a document, they form part. To us it seems clearly otherwise. Here is no more a separate contract than in the penalty of a bond, if the agreement be read as a whole, as every instrument should be, to arrive at its true intent. No doubt collateral agreements have been held enforceable in many cases; but before such authorities become applicable we must be satisfied that the agreement in question is really collateral, and this is the point about which the court says least.

"A large number of cases are cited, mostly American, which we do not profess to examine. But the English cases most nearly in point are easily distinguished. *Jeakes v. White*, 6 Ex. 873, 86 R.R. 527, was really this: 'In consideration that I investigate your title with a view to a loan, will you pay my costs in any event?' *Boston v. Boston*, [1904] 1 K.B. 124 (C.A.), comes to this: 'If you buy Whiteacre I will repay you the purchase money.' In neither case is there any contract for an interest in lands at all; no one is bound to convey or to buy. We hope the doctrine of *Campbell v. Mercier* will be reconsidered by some court of higher authority."

**HARD CASES MAKE BAD LAW.**

The Erie County (New York) Bar Association at its May meeting passed the following resolution: "That it is detrimental to the public welfare for the judges of this state to ignore well-settled principles in order to enable them to render decisions which conform more closely to the sense of justice and right of the individual judge or judges constituting the court." We presume there is good reason for re-stating a proposition which lies at the root of the administration of law, at least in Anglo-Saxon countries. The lay mind naturally runs into error on this subject and thinks that every case should be decided according to his or her individual idea of right and wrong; and the same crude notion prevails in the minds of those professional men who have failed to grasp the principles involved.

Our contemporary, *The Law Notes*, in referring to this matter, discusses some decisions in the New York Supreme Court in an article entitled, "Prevalence of alleged justice on the Bench," and remarks that "we have not noticed any cases decided by the New York Supreme Court where the judges exhibit a disgusting predilection for justice." That, however, is a domestic matter which we must leave to themselves to settle; but we gladly reproduce from the same journal the remarks of a learned western jurist, Mr. Justice Marshall, who says in *Clemons v. Chicago, etc., Ry. Co.*, 137 Wis. 387: "Rules of law cannot be changed by the court and adapted to the exigencies of particular cases, however distressing they may be. With indifference to results, except as seriousness thereof may stimulate greater care, established principles must be applied as the infallible test of what is right and what is wrong in the legal aspect. Whether the law as we find it is as we would have it to be if we were permitted to make it, instead of being mere instrumentalities to apply it, is immaterial. Our responsibility begins when we are invoked for its application. It ends when we apply it as we find it. The grade of fidelity with which the duty is performed is to be measured by the vigour and courage with which we labour in our own

special field, leaving the responsibility for changing the law to the department of government in which the constitution has lodged it."

The *Central Law Journal* in a series of articles one of which is entitled "Wrecker of law," makes some observations which are cognate to the matters above referred to; but which have special reference to certainty in pleading for the purpose of definite resultant conclusions in the decisions of the matter really involved in a suit. Unlearned and ignorant men have in this matter the same feminine desire (laudable enough in itself) to get rid of technicalities and get at the merits; but they go to work in the same clumsy and often helpless way as do those who seek to get what they call "justice" as distinguished from what they contemptuously style "law."

As to this we quote the following from our contemporary:—

"The position taken in this series of articles is that 'form' is just as necessary in the law, if its symmetry is to be preserved, and justice is to remain certain, as it is in engineering, chemistry or medicine; or as it is in baseball, or tennis, for that matter. If you want to make an effective stroke in golf, or an effective punch in the prize ring, you must do it according to form. All of which simply means that there are principles underlying all human effort, which, if observed, make the effort effective; if not observed, make it abortive or inefficient. So in the law,—its effort is to keep the peace of the state, to settle, to finish litigation. Interest reipublicæ ut sit finis litium. But this does not mean indiscriminate haste. It means that a cause must be settled according to prescribed rules, to the end that when it is once decided, it will be in fact 'settled.' The cause must not be left, after judgment, in the chaotic condition of having pleadings setting forth one cause of action, evidence developing another, and perhaps a judgment based upon both, or neither. This is not speculation. Specific instances can be given where exactly these things have happened. The technics of the law must be observed, or the law will be destroyed. We are drifting that way at present. Why do not the members of the bar who believe so,

and who are saying so, on all sides, make their protest effective? It can be shewn that a knowledge of the principles of the very subject which has been so long neglected—practice and procedure—would go far to remedy the disease, and to restore the harmony of the law."

In his "Circuit Journeys" Chief Justice Cockburn, in speaking of the trial of some women, mentions that he was greatly diverted by overhearing the opinion entertained by one of the accused of himself and his learned colleague. The virago remarked to one of her associates in the dock, "Twa auld gray-headed blackguards. They gie us plenty o' their law, but deevilish little joostice."

The learned founder of this journal, Sir James Gowan, was, in his capacity as a Division Court judge necessarily compelled in disposing of cases to remember that in deciding questions of law and fact, he was to make such order as might "appear to him just and agreeable to equity and good conscience." He was, however, strongly of the opinion that certainty and uniformity in the administration of the law was of primary importance. He once quoted to the writer a remark which seemed to him appropriate to the occasion, made by a celebrated judge of the United States when one of his associates remarked after his learned brother had delivered his judgment, "That may be law, but in my opinion it is not equity." "Equity," snorted his irritated senior, "Equity! What's equity? Damn equity!" This remark, by the way, would, no doubt, have been heard with much gusto by one of the best and wittiest of our own judges, Chief Justice Hagarty, who often expressed himself somewhat strongly when legislative fusion of law and equity was proposed, and finally carried out, in the Province of Ontario.

It will not be out of place in connection with this subject to reproduce a discussion which appears in a note to s. 54 in O'Brien's Division Court Act (1879). This note (p. 48), though it deals primarily with the incorporation of equity in Division Court administration is of interest in a discussion on the important subject brought to the attention of the Bench by the

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resolution of the Bar Association which gave rise to this article. The author there says:—

"It is now generally considered that the words 'just and agreeable to equity and good conscience,' have not reference merely to the (practically) limited equity administered by the Court of Chancery, but refer to something more than that, and signify what has been termed 'natural equity,' or that which is morally just between man and man in each particular case, irrespective of the probable or possible results logically consequent upon a broad application of the principles deducible from the supposed equities of such case, according to the view taken of them by a judge of average capacity.'" These remarks apply to the construction to be placed on the words of the Division Court Act, but the writer continues:—

"After all, certainty and uniformity in the administration of the laws are practically matters of primary importance, and cannot be too strongly insisted upon. The too numerous complaints on this head shew that something is wrong somewhere. To obtain certainty and uniformity, an intimate knowledge of and strict adherence to first principles on the part of the judge is indispensable, and this must be combined with the salutary maxims of equity, which are of universal application."

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It is well to give timely notice that on the first day of September next, the Revised Statutes of Ontario, relating to Short Forms of Conveyances (10 Edw. VII. c. 53), Leases (Ib. c. 54) and Mortgages (Ib. c. 55) will come into force. One result will be that all forms of conveyances, mortgages and leases will have to be altered to suit the new titles relating to the subjects as they will appear in the various statutes affecting them. We remember that Mr. Alexander Leith, in former days the great authority on real property in this province, used to predict serious consequences if the exact names of those statutes were not followed in all conveyances.

**REVIEW OF CURRENT ENGLISH CASES.**

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**FATAL ACCIDENT—FATHER AND TWO SONS KILLED—DEPENDENT—COMMON FUND.**

*Hodgson v. West Stanley Colliery* (1910) A.C. 229, although a decision under the English Workmen's Compensation Act of 1906, may nevertheless be found worthy of attention, as also having a bearing on the construction of the Fatal Accidents Act (R.S.O. c. 135). A father and two sons were killed, their wages had been put into a common fund, out of which they and the other members of the family consisting of the mother and other children were supported. It was contended that the mother was solely dependent on her husband, and could recover only in respect of his death; but this was overruled. Then it was contended that the maximum damages in respect of one death allowed by the Act could only be recovered, notwithstanding three workmen had been killed, but this also was overruled, and it was held by the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, Collins, and Shaw) that the widow and surviving children were dependent on all three of the men killed, and were entitled to recover damages in respect of the death of each of them.

**TRADE MARK—PASSING OFF GOODS AS THOSE OF ANOTHER—“CHARTREUSE”—VESTING OF FRENCH BUSINESS UNDER FRENCH JUDGMENT—ENGLISH TRADE MARK—FRENCH LAW.**

In *Lecouturier v. Rey* (1910) A.C. 262 the House of Lords (Lords Macnaghten, Collins, Atkinson, Shaw, and Loreburn, L.C.) have affirmed the decision of the Court of Appeal (1908) 2 Ch. 715 (noted, ante, vol. 45, p. 71). It may be remembered that the plaintiff as the representative of certain Carthusian monks claimed to restrain the defendants from using their English trade mark of “Chartreuse” in connection with a liqueur manufactured by the defendants, who had purchased from the French government the business formerly carried on by the monks in France. The defendants continued to carry on the manufacture of a liqueur, but not by the secret process of the plaintiffs, and claimed to be entitled to use in connection with their manufactures, the English trade mark of the plaintiffs,

which the defendants had procured to be transferred to them in the register, on the representation that they were transferees thereof by virtue of a judgment of a French court. The plaintiffs claimed that this transfer was improper, on the ground that the French court had no jurisdiction to deal with an English trade mark and the plaintiff claimed a rectification of the register. The Court of Appeal so held, and gave judgment for the plaintiffs, and rightly as the House of Lords held. It may be remarked that a French court had in another action held that the monks who had gone to Spain where they continued to manufacture liqueur by their secret process were entitled to use in connection therewith the name "Chartreuse." So that the present case does not in any way conflict with the judgment of the French courts.

#### HYPOTHETICAL CASE—COURT DECLINING JURISDICTION.

*Glasgow Navigation Company v. Iron Ore Company* (1910) A.C. 293. After the argument of an appeal in this case before the House of Lords (Lord Loreburn, L.C., and Lords Atkinson, and Shaw), it transpired that the argument had been based on an hypothetical and not an actual state of facts, the House declined jurisdiction, and refused to make any order.

#### FALSE IMPRISONMENT—ENTRY ON WHARF—REFUSAL TO PERMIT PLAINTIFF TO LEAVE WHARF WITHOUT PAYMENT OF TOLL—UNREASONABLE CONDUCT OF PLAINTIFF.

*Robinson v. Balmain New Ferry Co.* (1910) A.C. 295. This was an appeal from the High Court of Australia. The action was for false imprisonment; the facts being, that the defendants carried on a ferry business, and the plaintiff had contracted with the defendants to enter their wharf and stay there until the ferry should start and then be taken thereby to the opposite shore. No breach of the defendants' contract was alleged, but after the plaintiff entered the wharf he changed his mind, and wanted to leave without paying the prescribed toll for exit, and was for a time forcibly prevented. At the trial the plaintiff obtained a verdict for £100, but the High Court had set aside the verdict and nonsuited the plaintiff, on the ground that the defendants were justified in refusing to allow the plaintiff to leave the wharf without paying the toll which was reasonable and proper. The Judicial Committee of the Privy Council (Lord Loreburn, L.C., and Lords Macnaghten, and Collins, and Sir A. Wilson) being

of the opinion that this decision was sound dismissed the appeal and the same time remarked that the plaintiff's conduct was "thoroughly unreasonable."

TORONTO RAILWAY—(8 EDW. VII. c. 112, s. 1, ONT.).

*Toronto v. Toronto Ry.* (1910) A.C. 312 is a case of limited interest, but incidentally shews that where parties wish to reverse a judicial decision by Act of Parliament it is necessary to be extremely carefully to do so in very explicit terms. Probably 8 Edw. VII. c. 112, s. 1, Ont., was intended by the draughtsman to have that effect, but if so, he made use of very inapt language, for by no reasonable construction could the Act be so construed. So it was held by the Railway Board, and so also by the Court of Appeal, and the Judicial Committee (Lords Macnaghten, Atkinson, Collins, and Shaw) declared the appeal of the city "a very idle one."

COMPANY—NON-PAYMENT OF CALLS—FORFEITURE OF SHARES—  
OWNER OF SHARES FORFEITED ALSO DIRECTOR.

*Jones v. North Vancouver Land Co.* (1910) A.C. 317. This was an appeal from the Supreme Court of British Columbia. The action was brought by Clara B. Jones to obtain a declaration that 240 shares in the defendant company had not been forfeited. The certificate of the shares in question had been made out in the name of the plaintiff, but it appeared by the evidence that she had on the same day assigned the certificate to her husband, and that he was the real owner. The company in 1898 had made a call on the shares, notice of which had been given to the plaintiff at the address given by her husband, and default having been made she was again notified that the shares were forfeited. Her husband was a director of the company, and was present and consenting both to the call and forfeiture of the shares for non-payment. The prospects of the company having improved the action was brought to set aside the forfeiture. The Provincial Court held, in these circumstances, that the action must be dismissed, and the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Collins, and Shaw) affirmed the decision being clearly of the opinion that the plaintiff's husband was the real owner of the shares, and had full notice and knowledge of all the proceedings resulting in their forfeiture, and could not now be heard to dispute its validity on any technical grounds of irregularity in respect to notice, etc.

COVENANT TO RENEW LEASE—ACTION FOR SPECIFIC PERFORMANCE  
OF COVENANT TO RENEW—RELIEF AGAINST FORFEITURE OF  
RIGHT TO RENEWAL—(R.S.O. c. 135, s. 13).

*Greville v. Parker* (1910) A.C. 335. This was an appeal from the Court of Appeal of New Zealand. The action was brought for the specific performance of a covenant for renewal contained in a lease. The covenant was conditioned on the lessee performing the covenants contained in the lease up to the expiration of the lease. The lessee had made continual defaults in performing the covenants of the lease, and the lessor for that reason refused to renew. The plaintiff claimed that under statutes enabling the court to relieve against forfeitures (see R.S.O. c. 170, s. 13), the court was enabled to relieve him against the forfeiture of his right to renewal by reason of his non-performance of his covenant, and the Colonial Court held that although the evidence disclosed a persistent course of wilful neglect of his covenants by the lessee, the defendants were in effect enforcing a forfeiture without first giving the defendant notice (see R.S.O. c. 135, s. 13); and granted specific performance. But the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, and Collins, and Sir A. Wilson) reversed that decision, their lordships being of the opinion that even if the court had under the statutes power to relieve against the forfeiture, the circumstances in which the covenants had been broken must be such as to give the lessee an equitable claim to relief. But their lordships held that the defendants were not seeking to enforce a forfeiture, and that the Act relied on (which is similar in terms to R.S.O. c. 135, s. 13) gives no power to the court to relieve against the non-performance of a condition precedent. The action was therefore dismissed.

STANDARD BEARER OF SCOTLAND.

*Wedderburn v. Lauderdale* (1910) A.C. 342 is an interesting case from an antiquarian point of view. The plaintiff the Earl of Lauderdale claimed to be entitled to carry the standard of Scotland before the King. The defendant an heir of one Scrymgeour (which means "sharp fighter") claimed to be entitled under a grant conferred on his ancestor by Malcolm III. or one of the Alexanders. The plaintiff claimed under a subsequent grant made on the erroneous assumption that the Scrymgeour family was extinct. The Court of Claims had allowed the defendant's claim, and he had carried the standard before the

late King at his coronation, but it was held this did not amount to res judicata. The Scotch Court of Session had decided in favour of the plaintiff the Earl of Lauderdale, but the House of Lords reversed that decision, holding that the "sharp fighters" had the better right. Their lordships also held that under an Act of the Scotch Parliament of 1455 it was not open to the King to make any grant in derogation of that to Scrymgeour; and that the office was hereditary, and was not capable of alienation voluntarily or in execution.

**ESTOPPEL—RES JUDICATA—LANDLORD AND TENANT—AGREEMENT FOR LEASE—ACTION FOR RENT—DEFENCE NO CONCLUDED AGREEMENT—SECOND ACTION—DEFENCE STATUTE OF FRAUDS.**

In *Humphries v. Humphries* (1910) 1 K.B. 796, the doctrine of res judicata was applied in somewhat peculiar circumstances. The plaintiff was owner of certain premises and entered into negotiations for leasing them to the defendant, and on 29 Oct., 1907, defendant handed to the plaintiff a stamped document which the plaintiff claimed constituted an agreement by the defendant to take a lease of the premises for fourteen years at a specified rent. The defendant, however, claimed that there was no concluded agreement and refused to take possession. The plaintiff then brought an action to recover rent due up to June, 1908. The defendant in this action denied the existence of any concluded agreement for a lease, but did not set up the Statute of Frauds. The action was tried and judgment given in favour of the plaintiff. Further rent having fallen due the present action was brought in which the defendant set up the fourth section of the Statute of Frauds as a defence. The judge of the County Court held that as in the former action the court had decided that there was a valid and binding agreement for a lease, the matter was res judicata, and the Divisional Court (Phillimore and Bucknill, JJ.) held that he was right.

**WATER SUPPLY—"DOMESTIC PURPOSES"—RAILWAY.**

*Metropolitan Water Board v. London, Brighton and South Coast Railway* (1910) 1 K.B. 804 may be briefly noticed for the fact that a Divisional Court (Phillimore and Bucknill, JJ.) decided that a supply of water to a railway station for drinking by officials and passengers, and for cleansing the station premises, does not come under the head of a supply for "domestic purposes," but is a supply for "railway purposes."

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CRIMINAL LAW—"ENCOURAGING SEDUCTION" OF GIRL UNDER SIXTEEN—CHILDREN'S ACT, 1908 (8 EDW. VII. c. 67), s. 17—(CR. CODE, SS. 215, 217).

*Rex v. Moon* (1910) 1 K.B. 818. This was an indictment of the father and mother of a girl under sixteen for encouraging her seduction. The evidence was that the prisoners and their daughter slept in a barn and that they knowingly suffered the daughter to sleep in a corner of the barn with a man by whom she had been previously seduced. The prisoners were convicted, but the conviction was quashed by Lawrence, Jelf and Bray, JJ., on the ground that "seduction" in the 8 Edw. VII. c. 67, s. 7, means the inducing a female to part with her virtue for the first time, and is not the same as having carnal connection, which by the way are the words used in the Criminal Code ss. 215 and 217; and which may therefore perhaps be found to cover an act like that in question in the present case.

NEGLIGENCE—PUBLIC SCHOOL—DANGEROUS DOOR SPRING—INJURY TO SCHOLAR—LIABILITY OF SCHOOL AUTHORITIES.

*Morris v. Carnarvon County Council* (1910) 1 K.B. 840. In this case the Court of Appeal (Williams, Moulton and Farwell, L.J.J.) have affirmed the decision of the Divisional Court (1910) 1 K.B. 159 (noted ante, p. 170), to the effect, that where a pupil at a public school is injured by getting her fingers pinched in a swing door of the school building, owing to the door being closed by a powerful spring, the school authorities are liable in damages for the injury so occasioned, the door being found by the jury to be unsuitable for an infant school.

PARTNERSHIP—NOTICE OF DISSOLUTION—PARTNERSHIP TERMINABLE BY MUTUAL AGREEMENT—PARTNERSHIP ACT, 1890 (53-54 VICT. c. 39), ss. 26, 32.

In *Moss v. Elphick* (1910) 1 K.B. 846 the Court of Appeal (Williams, Moulton and Farwell, L.J.J.) have affirmed the judgment of the Divisional Court (1910) 1 K.B. 465 (noted ante, p. 326), to the effect that under the English Partnership Act where partnership is terminable by mutual consent, it is not open to any of the partners to give notice of dissolution without such consent.

**LIBEL—DISCOVERY—DOCUMENTS REFERRED TO IN DOCUMENTS PRODUCED—RELEVANCY—FURTHER AFFIDAVIT OF DOCUMENTS—PRODUCTION.**

*Kent Coal Concessions v. Duguid* (1910) 1 K.B. 904. This was an action of libel brought against the defendants as publishers of a newspaper, which libel the plaintiff alleged meant that they, the plaintiffs, had no chance of success. The defendants by their defence denied that the alleged libel bore the meaning attributed to it by the plaintiffs, or any defamatory meaning; and they further pleaded that in so far as it contained statements of fact it was true, and in so far as it consisted of criticism it was fair and bonâ fide comment on a matter of public interest. In answer to an order for production of documents, the plaintiffs produced certain reports made by the directors of the plaintiff company to the shareholders with balance sheet appended, containing statements which on their face were derived from books of account which were not produced. The defendants moved for a further affidavit on production, contending that the books of account should be produced. The Master granted the application and was affirmed by Jelf, J., whose order was affirmed by the Court of Appeal (Farwell and Kennedy, L.J.J.), Williams, L.J., dissenting. The majority of the Court of Appeal thought that as the plaintiff's admitted the relevancy of the documents produced by them, they thereby also admitted the relevancy of the books from which the statements they produced were compiled. Williams, L.J., considered the application was in effect an attempt by the defendants to find out whether there was in fact any justification for their defence of fair comment without undertaking the responsibility of justifying the publication with the meaning attributed to it by the innuendo.

**MORTGAGE—PUISNE INCUMBRANCER—CONSENT TO FORECLOSURE—RIGHT OF PUISNE INCUMBRANCER AFTER FORECLOSURE TO SUE ON COVENANT—DEMAND IN WRITING—FOLLOWING ASSETS IN LANDS OF LEGATEES AND DEVISEES—(R.S.O. c. 129, s. 38).**

*Worthington v. Abbott* (1910) 1 Ch. 588. Under a mortgage dated in 1897 the plaintiffs in this case were mortgagees of a public house subject to prior mortgages. Proceedings having been taken in 1904 by the prior mortgagees for foreclosure, the plaintiff's consented to a judgment for immediate foreclosure, without the appointment of any day for redemption. The

mortgagor at this time was thought to be worthless. In 1907, however, she died, leaving an estate of £8,000, which was devised and bequeathed to the defendants, and, after due notice, the executors having no notice of the plaintiff's claim, distributed the assets among the defendants, the beneficiaries named in the will. The plaintiffs then brought the present action on the covenant of the deceased mortgagor to compel the beneficiaries to refund so much of the assets paid to them as might be necessary to satisfy the plaintiffs' claim. The covenant provided that upon demand in writing left at the mortgaged premises the mortgagor would repay the principal money and interest. No demand was ever made on the premises. The defendants contended that by consenting to a foreclosure the plaintiffs had debarred themselves from the right to sue on the covenant, and also contended that the action was not maintainable because there was no proof of any demand in writing on the premises. Eve, J., who tried the action held that the consent of the plaintiffs to the foreclosure did not debar them from suing on the covenant. With regard to the demand in writing he thought that was a stipulation in case of the plaintiffs and to enable them to enforce the covenant without personal service by delivering the demand on the premises, and that the true intent of the provision was to bring home to the mortgagor or those claiming under her, that the mortgagees were demanding their money, and on the evidence of demand by letter prior to suit, he thought that the provision had been sufficiently complied with. Judgment was therefore given against the defendants to refund as prayed. We may note that the reporter has appended the form of judgment, which may be useful for reference.

**WILL—CONSTRUCTION—CHARITABLE TRUST—“SITE” TRUSTEES—  
DECISION OF MAJORITY OF TRUSTEES OF CHARITY.**

*In re Whiteley, Bishop of London v. Whiteley* (1910) 1 Ch. 600. The late William Whiteley by his will left £1,000,000 in trust for the purchase of freehold “lands situate in some one of the western suburbs of London, or in the adjacent country” to be selected by his trustees “as a site” for the erection of buildings to be used as homes for aged poor persons to be called “Whiteley Homes for the aged poor,” or by such other name as the trustees should determine, but so that the name of “Whiteley” should form part of such name or names. The will directed that “the site” to be selected should be in a bright and healthy “spot,”

even if such "site" could only be acquired at an additional expense. The trustees numbered ten. On a summary application for construction of the will, Eve, J., held that the trustees were not entitled to select or acquire more than one site; and that the decision of the majority of the trustees as to its location must govern, in which respect the rule as to charitable trusts is the same as in the case of public trusts.

**MARRIAGE SETTLEMENT—AGREEMENT TO SETTLE WIFE'S AFTER-ACQUIRED PROPERTY—GIFT FROM HUSBAND TO WIFE—NEXT OF KIN CLAIMING BENEFIT OF COVENANT—TRUSTEES NOT BOUND TO ENFORCE COVENANT FOR BENEFIT OF VOLUNTEERS.**

*In re Plumptre, Underhill v. Plumptre* (1910) 1 Ch. 609. By a marriage settlement it was agreed that the wife's after-acquired property should be settled upon the trusts of the settlement. During coverture in 1884 the husband made a gift to the wife of a sum of money which was invested in railway debenture stock, which stood in her name at the time of her death intestate. Her husband took out administration to her estate and the stock was now standing in his name. The trusts of the settlement were the usual trusts of a wife's fund with an ultimate trust after the husband's death, in the events which had happened, for the next of kin of the wife. The trustees now made a summary application to the court to have it determined, whether the fund given to the wife by the husband was caught by the covenant, and Eve, J., held that it was; and also whether or not they were bound to en-

~~force~~ the covenant for the benefit of the wife's next of kin, and on this point Eve, J., held that the next of kin being strangers to the marriage consideration were in the position of mere volunteers, and there was consequently no obligation resting on the trustees to enforce the covenant for their benefit, and that the trustees could not now bring an action to recover damages for breach of the covenant in 1884 against either the husband or the estate of the wife; and that the next of kin could have no relief in equity because, as far as they were concerned, there was no trust of the fund in question, but a mere voluntary contract on the part of husband and wife to create a trust.

**MORTGAGE—CLOG ON REDEMPTION—PUBLIC HOUSE—COVENANT TO PURCHASE FROM MORTGAGEE FOR 28 YEARS—PROVISO AGAINST REDEMPTION WITHOUT CONSENT OF MORTGAGEE FOR 28 YEARS.**

*Morgan v. Jeffries* (1910) 1 Ch. 620 was an action by a mortgagor for redemption. The mortgaged premises consisted of a

public house and the mortgagor had covenanted to buy all beer, etc., required therefor from the mortgagee for 28 years, or so long after as any money remained due on the mortgage; and the mortgage also provided that the mortgagor should not, without the consent of the mortgagee, redeem the mortgage before the expiration of 28 years. The mortgage was made in 1896. The plaintiff claimed that these stipulations were a clog on redemption and as such void. Joyce, J., who tried the action, was of the opinion, that the plaintiff's contention was right, and held that even if the proviso against redemption might be supported where there was a similar provision against calling in the mortgage, it could not be so in the absence of such provision as it exceeded all reasonable limits. As to the covenant to purchase beer, etc., he says nothing, but that also would seem to be a covenant which could not be enforced after redemption: see *Noakes v. Rice* (1902) A.C. 24.

**COMPANY—PROSPECTUS—FACTS TO BE STATED IN PROSPECTUS—OMISSION OF FACTS FROM PROSPECTUS—REMEDY FOR OMISSION—COMPANIES ACT, 1908 (8 EDW. VII. C. 68), S. 81—(7 EDW. VII. C. 34, S. 99 (ONT.).**

*In re Wimbledon Olympia* (1910) 1 Ch. 630. This was a motion on behalf of the shareholder of a company to rectify the register of shareholders, by striking out the applicant's name, on the ground that the prospectus issued by the company omitted to state facts which ought to have been stated. Neville, J., held that the omission of facts required by statute to be stated in a prospectus did not per se entitle a shareholder to rectification of the register, although he conceded that there might be omissions of such a character as, on other grounds than mere omission, would entitle a shareholder to relief. But bare omission was not enough.

**COMPANY—PROSPECTUS—OMISSION TO STATE FACTS REQUIRED IN PROSPECTUS—EFFECT OF OMISSION—COMPANIES ACT, 1908 (8 EDW. VII. C. 69), S. 81—(7 EDW. VII. C. 34, S. 99(O.)).**

*In re Wimbledon Olympit* (1910) 1 Ch. 632. This was an application on the part of a shareholder of a limited company to have his name removed from the register of shareholders. The application succeeded on the ground that the applicant had been misled by the actual statements contained in the prospectus, but Neville, J., held that the mere omission from the prospectus of

facts required by law to be stated therein does not per se entitle a shareholder who has taken shares on the faith of the prospectus to a rectification of the register.

**STOCK EXCHANGE—BROKER AND CLIENT—PURCHASE OF SHARES—  
CARRYING OVER—ACCOUNT RENDERED BY BROKER TO CLIENT—  
OMISSION BY BROKER TO GIVE PARTICULARS OF HIS CHARGES—  
EQUITABLE MORTGAGE—IMPLIED POWER OF SALE—REASON-  
ABLE NOTICE TO MORTGAGOR.**

In *Stubbs v. Slater* (1910) 1 Ch. 632, an appeal was had from the decision of Neville, J. (1910) 1 Ch. 195 (noted ante, p. 166), holding that where a broker who had purchased shares for the plaintiff on margin, and who in his accounts for carrying the shares over, had charged a sum of 8½d. per share net, which included both his own and the jobber's charges, but how much the jobber and how much the broker were respectively charging was not specified, the broker in such a case is not entitled to recover his own charges against his client because they were in the nature of "a secret profit." The Court of Appeal (Cozens-Hardy, M.R., and Buckley, L.J., and Joyce, J.) were unable to agree with this view, and held that the defendant having made his charges in a way customary according to the well-known practice of the stock exchange, and the charges being proper and reasonable, he was entitled to recover them. On the other point in the case as the right of the defendant, as the holder of an equitable mortgage of shares to secure the balance due by the plaintiff, to an implied power of sale of the security and as to the sufficiency of the notice given for the purpose of exercising that power the Court of Appeal agreed with Neville, J.

**MORTGAGE TO SECURE CURRENT ACCOUNT—BANK—SUBSEQUENT  
MORTGAGE—APPROPRIATION OF PAYMENTS—RULE IN CLAY-  
TON'S CASE.**

*Deeley v. Lloyd's Bank* (1910) 1 Ch. 648. In this case the well-known rule in *Clayton's* case as to the appropriation of payments was unsuccessfully invoked. The facts were as follows. One Glaze in 1893 mortgaged property to the defendants to secure an overdraft on his current account limited to £2,500, and the bank held other security for the overdraft to the amount of £1,000. In 1895 he mortgaged the same property to the plaintiff subject to the prior mortgage. Notice of plaintiff's mortgage was given to the defendants, and they without opening any new

account continued their current account with Glaze, who from time to time paid moneys to the defendants. These payments, if applied according to the rule in *Clayton's* case would, by 6 Jan., 1896, have paid off the debt due to the bank when the second mortgage was given. The defendants never allowed Glaze to overdraw more than £3,500 except temporarily on deposit of additional security. Glaze also occasionally appropriated payments to meet particular cheques. The plaintiff through her husband, who was Glaze's solicitor, had full knowledge of all his dealings with the defendants. In 1899 Glaze became bankrupt and the defendants realized their securities for a price sufficient to pay the amount due them. The plaintiff did not then complain and he procured the defendant to release a guaranty given by Thomas Glaze for the debt of John Glaze, and thereupon he obtained a release of a counter guaranty which the plaintiff had given to Thomas Glaze. In 1905 the present action was commenced for an account, the plaintiff contending that the defendants were not entitled to charge as against the plaintiff for advances made to John Glaze after notice of the plaintiff's mortgage. But Eve, J., held that there was no intention on the part of the bank to appropriate payments according to the rule in *Clayton's* case, and that the debt for which they held their mortgage was never satisfied except by the sale, and he dismissed the action, and the Court of Appeal (Moulton and Buckley, L.J.J., Cozens-Hardy, M.R., dissenting) affirmed his decision. The majority of the court thought, that having regard to the circumstances of the case, and the conduct of the parties, no appropriation of payments by the bank according to the rule in *Clayton's* case could be presumed to have been made, but Cozens-Hardy, M.R., considered the case was governed by *Hopkinson v. Rolt*, 9 H.L.C. 514, and *Ratcliffe's Case*, 6 App. Cas. 722, and that the presumption of appropriation when there is a second mortgage is conclusive.

WILL AND CODICIL—CONSTRUCTION—SUBSTITUTION OF EXECUTOR—  
SUBSTITUTED EXECUTOR TO BE TREATED AS NAMED “THROUGH-  
OUT,” INSTEAD OF EXECUTOR ORIGINALLY NAMED—LEGACY TO  
EXECUTOR AS REMUNERATION—LEGACY TO EXECUTOR OF SHARE  
IN RESIDUE—IMPLIED REVOCATION.

*In re Freeman, Hope v. Freeman* (1910) 1 Ch. 681 is one of those cases in which the court had to solve a difficulty created by a testator, by reason of his apparently having followed a common

form of expression without due regard to its application to the actual circumstances. By the will in question one Bowyer Nichols was appointed executor, and to him was given (1) a legacy of £1,000 "if he shall prove my will," and (2) a legacy of a share in the testator's residuary estate. By a codicil the testator revoked the legacy of £1,000 to Bowyer Nichols and his appointment as executor, and appointed in his place Harry Freeman, to whom he bequeathed £200 for his trouble in acting as executor, and the codicil adopting a common form proceeded as follows: "And I declare that my said will shall be construed as if the name of the said Harry Freeman were inserted in my said will throughout instead of the name of the said Bowyer Nichols, and in all other respects I confirm the said will." It was contended that this clause had the effect of substituting Harry Freeman as the legatee of the share of the residue by the will bequeathed to Bowyer Nichols. Joyce, J., came to the conclusion that it was so doubtful on the reading of the codicil that the testator intended to substitute Freeman for Nichols as the legatee of the residuary share, that he ought not to give that effect to the codicil, but to read the concluding clause as merely applying to Nichols in his character of executor, and the Court of Appeal (Cozens-Hardy, M.R., and Buckley and Kennedy, L.J.J.) agreed that that was the proper conclusion.

**WILL—GIFT OF INCOME TO DAUGHTER TILL MARRIAGE—GIFT OVER OF FUND ON MARRIAGE—DAUGHTER DYING UNMARRIED—ABSOLUTE GIFT—DETERMINABLE LIFE INTEREST.**

*In re Mason, Mason v. Mason* (1910) 1 Ch. 695. In this case a testatrix directed the trustees of her will to pay the income of her residuary estate to her daughter until she should marry and after her marriage to pay thereout a legacy of £3,000, and divide the balance between the testatrix's surviving sons. The daughter died unmarried, and the question to be determined was whether the gift to the daughter was an absolute gift of the income, or whether it terminated at her death so that the gift over might then take effect. Joyce, J., held that he was bound by *Rishton v. Cobb*, 5 My. & Cr. 145, to hold that in the event which had happened, this bequest of income amounted to an absolute gift of the residue to the daughter, but the Court of Appeal (Cozens-Hardy, M.R., and Buckley and Kennedy, L.J.J.) thought that *Rishton v. Cobb* was distinguishable because in that case there was no gift over, and this notwithstanding the dictum of Lord Cottenham regarding the state of widowhood and spinsterhood, the former, in his opinion, being terminated by death, and the latter not.

**SECURITY FOR COSTS—LEAVE TO SUE IN FORMA PAUPERIS.**

In *Willé v. St. John* (1910) 1 Ch. 701 the Court of Appeal (Cozens-Hardy, M.R., and Williams, Moulton, Farwell and Buckley, L.J.J.) held that where after an order had been made staying proceedings until security for costs of an appeal should be given, and before the time limited for complying with the order expired, the appellant had obtained leave to sue in forma pauperis, that this put an end to the stay of proceedings contained in the order for security.

**PARTNERSHIP—MORTGAGE OF PARTNER'S INTEREST—RIGHT OF MORTGAGEE TO AN ACCOUNT—ARBITRATION CLAUSE—DISCRETION—STAY OF PROCEEDINGS—ARBITRATION ACT, 1889 (52-53 VICT. c. 49), s. 4—(9 EDW. VII. c. 35, s. 8, ONT.).**

*Bonnin v. Neame* (1910) 1 Ch. 732. This was an action by the mortgagees of a partner's share in a partnership, for an account of the partnership in order that their mortgagor's share might be ascertained. The defendants applied to stay proceedings on the ground that the partnership deed contained the usual arbitration clause in case of disputes arising between the partners, and it was claimed there was a dispute as to the partner's share claimed by the plaintiffs. It appeared that under the arbitration clause arbitrators had been appointed by the partners, who had expressed strong opinions in favour of their respective appointors. In these circumstances Eady, J., held that it was in the discretion of the court as to whether or not a stay should be granted; and in the exercise of that discretion, the fact that partisans had been appointed arbitrators might be properly taken into account, and he refused the stay; being also of the opinion that the plaintiffs were not bound by the arbitration clause, which did not extend in terms to persons claiming under the partners.

**VENDOR AND PURCHASER—CONVEYANCE—PLAN.**

*In re Sansom & Narbeth* (1910) 1 Ch. 741. The simple question submitted to Eady, J., in this matter under the Vendors and Purchasers' Act was whether or not a purchaser is entitled where land has not been sold according to any plan, nevertheless to have a plan made and referred to in the conveyance from his vendor. This question Eady, J., answers in the affirmative, having regard to the fact that prior conveyances under which the

vendors acquired title had been made with reference to a plan; and he expresses the opinion that in all simple cases where a plan would assist the description, the purchaser has a right to have a plan on the conveyance.

**WILL—TRUSTS OF REAL ESTATE—POWER OF SALE—CONVERSION AFTER DEATH OF HEIR AT LAW—REAL OR PERSONAL ESTATE.**

*In re Dyson, Challinor v. Sykes* (1910) 1 Ch. 750. Perhaps since our Devolution of Estates Act in Ontario, questions of the kind discussed in this case may not be of much importance here. The facts were that land had been devised in trust for Jane Dyson for life with a gift over upon trusts that failed in Jane Dyson's lifetime, so that the equitable remainder in fee became vested in the testator's heir at law, under the will the trustees had an absolute power of sale over the land. This power was not exercised until after the death of the heir at law, and the question was whether the proceeds were to be regarded as real or personal estate. Neville, J., held that the person entitled to the heir at law's real estate at the date of the sale, and not his personal representative, was entitled to the proceeds of sale, because the conversion did not take place until the power of sale was exercised.

**LANDLORD AND TENANT—COVENANT NOT TO ASSIGN WITHOUT LEAVE—CONSENT NOT TO BE WITHHELD FROM “A RESPECTABLE AND RESPONSIBLE PERSON”—ASSIGNMENT TO A LIMITED COMPANY AFTER CONSENT REFUSED—FORFEITURE OF LEASE.**

*Wilmett v. London Road Car Co.* (1910) 1 Ch. 754 turns upon the construction of a covenant in a lease not to assign without the lessor's consent. The lease provided that the consent of the lessors would not to be withheld to an assignment "to a respectable and responsible person." The lessee desired to assign to a limited company, and the lessors refused to consent, whereupon the lessee assigned to the company without consent, and Neville, J., held that by so doing he had forfeited his lease, because a limited company is not "a respectable and responsible person" within the meaning of the covenant.

**LANDLORD AND TENANT—AMBIGUITY IN LEASE—COUNTERPART—FORFEITURE—RELIEF AGAINST FORFEITURE—NEGLIGENCE.**

In *Matthews v. Smallwood* (1910) 1 Ch. 777 three points are decided by Parker, J. First, that where there is a patent am-

biguity in a lease, a counterpart of the lease may be referred to for the purpose of removing it. Second, a lessor does not waive a right of entry unless, knowing the facts, he does something unequivocal which recognizes the continuance of the lease; and third, where a lease containing a clause against assignment without the consent of the lessor, is assigned by way of mortgage to trustees, the trustees are guilty of negligence if they accept the assignment without inquiry as to the consent, and cannot be relieved from the consequent forfeiture of the lease assigned.

**WILL—TENANT FOR LIFE AND REMAINDERMAN—TRUST FOR IMMEDIATE CONVERSION—GIFT OF INCOME—PROFITS PRIOR TO CONVERSION—CAPITAL OR INCOME.**

*In re Elford, Elford v. Elford* (1910) 1 Ch. 814. A testator gave inter alia his business at Sicily on trust for immediate conversion. He gave the income of his estate to his widow for life with remainder to his daughter. The will contained a clause that "all the income arising from my estate" should be applied as if it were income arising from the proceeds of the conversion, no part thereof being liable to be retained as capital. Prior to the sale of the Sicily business profits had been derived therefrom, and the question was raised there being a trust for immediate conversion of that business, whether such profits were to be treated as capital or income. Eve, J., decided that the expression "all the income of my estate" included the profits arising from the business, and that there was no sufficient ground for limiting the clause giving the tenant for life the income of unconverted property to that part of the estate which was subject to a discretionary power to postpone conversion. The widow was therefore adjudged to be entitled to the profits of the Sicily business.

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REPORTS AND NOTES OF CASES.

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**Dominion of Canada.**

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**SUPREME COURT.**

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**Ont.]****ONTARIO BANK v. McALLISTER.**

[June 15.

**Banking—Security for debt—Transfer of business—Operation by bank—Assignment of lease—R.S.C. (1906) c. 29, s. 76, ss. 1(d) and 2(a), s. 81.**

A bank entered into an agreement with a company heavily in its debt carrying on a milling business, which agreement provided that the company should pay the bank \$10,000 and surrender all its assets including an assignment of the lease of its business premises, and that the bank should assume payment of its debts and release it from all further liabilities. By a subsequent agreement it was provided that the business of the company should be carried on as before with a view to reducing the debt due to the bank and disposing of it as a going concern as soon as possible, the bank to indemnify against any liabilities incurred while it was so carried on. No assignment of the lease of the business premises to the bank was executed, and the lessors having brought action against the company for rent due thereunder, the bank was brought in as a third party by the company claiming indemnity against payment of such rent under said agreements.

*Held*, affirming the judgment of the Court of Appeal (17 O.A.R. 145), DUFF and ANGLIN, JJ., dissenting, that the bank should indemnify the company against such payment, the agreements to take an assignment of the lease and to carry on the business as a going concern not being illegal as a violation of provisions of the Bank Act. Appeal dismissed with costs.

*Morine, K.C., and McKelcan*, for appellants. *Nesbitt, K.C., and O'Connell*, for respondents.

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**N.S.]****CITY OF SYDNEY v. CHAPPELL BROS.**

[June 15.

**Municipal council—Offer of money to build library—Special Act of Legislature—Power to procure site—Contract for building—Powers of municipality.**

A sum of money was offered the city of Sydney for a public library on condition that the city procured the site and provided

for its maintenance. An Act of the Legislature empowered the city to purchase a site and tax the ratepayers for the cost. The library committee of the city council entered into a contract with C. for plans of the building which were prepared, but the scheme afterwards fell through, the money offered was not paid, nor the library built. In an action by C. for the price of the plans,

*Held*, that the city had no power to make a contract for the building and the action could not be maintained. Appeal allowed with costs.

*O'Connor*, K.C., and *Finlay McDonald*, for appellant. *Newcombe*, K.C., for respondent.

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N.S.]      SYDNEY POST PUBLISHING CO. v. KENDALL. [June 15.

*Libel—Election contest—Withdrawal of candidate—Allegation of improper motives—Trial of action—Verdict for defendant—New trial.*

K. was a member of the House of Commons prior to the election in 1908, and in August of that year a letter was published in the Sydney Post, which contained the following, which referred to him: "The doctor had a great deal to say of the elections in 1904. Well, I have some recollections of that contest myself, and I ask the doctor: Why did you at that time withdraw your name from the Liberal convention? The majority of the delegates came there determined to see you nominated. Why did you not accede to their request? Doctor Kendall, what was your price? Did you get it? Take the good Liberals of this county into your confidence and tell them what happened in those two awful hours in a certain room in the Sydney Hotel that day? The proceedings of the convention were held up for no reason that the delegates was, but for reasons which are very well known to you, and three or four others whom I might mention. One speaker after another killed time at the Alexandria Hall, while you were in dread conflict with the machine. Finally the consideration was fixed and you took off your coat and shouted for Johnston. What was that consideration?"

On the trial of an action by K. against the proprietors of the Post, the jury gave a verdict for the defendants.

*Held*, DAVIES and DUFF, JJ., dissenting, that the publication could only be construed as charging K. with having withdrawn his name from the convention for personal profit, and was libellous. The verdict was, therefore, properly set aside by the

court below, and a new trial ordered. Appeal dismissed with costs.

*W. B. A. Ritchie, K.C., for appellants. Mellish, K.C., and D. A. Cameron, K.C., for respondent.*

Ref. P.C.]

IN RE CRIMINAL CODE.

[June 15.

*Reference by the Governor-General in Council—Criminal Code—Procedure—Alberta and Saskatchewan—Indictable offence Preliminary inquiry—Preferring charge—Consent of Attorney-General—Powers of deputy—Lord's Day Act, s. 17.*

Sec. 783a of the Criminal Code (6 & 7 Edw. VII. c. 8) provides that in the provinces of Alberta and Saskatchewan it shall not be necessary to prefer any bill of indictment before a grand jury, but it shall be sufficient that the trial of any person charged with a criminal offence shall be commenced by a formal charge in writing setting forth as in an indictment the offence with which he is charged. 2. Such charge may be preferred by the Attorney-General or an agent of the Attorney-General or by any person with the written consent of the judge of the court or of the Attorney-General or by order of the court.

*Held*, 1. IDINGTON, J., dissenting, that a preliminary inquiry before a magistrate is not necessary before a charge can be preferred under this section.

2. The deputy of the Attorney-General for either of said provinces has no authority to prefer a charge thereunder without the written consent of the judge or of the Attorney-General or an order of the Court.

Sec. 17 of the Lord's Day Act provides that "no action or prosecution for a violation of this Act shall be commenced without the leave of the Attorney-General for the province in which the offence is alleged to have been committed . . ."

*Held*, that the deputy of the Attorney-General of a province has no authority to grant such leave.

*Newcombe, K.C., for Dominion of Canada. Ford, K.C., Deputy Atty.-Gen. for Saskatchewan. C. A. Grant, for Alberta.*

## Province of Ontario.

### HIGH COURT OF JUSTICE.

Magee, Riddell, Latchford, JJ.]

[June 2.

WOODS *v.* CANADIAN PACIFIC RY. CO.

Railway—Construction of drain—Right of way—Flooding adjoining lands.

Appeal from judgment of MACMAHON, J.

The statement of claim was modelled upon the Railway Act, R.S.C. 1906, c. 37, s. 250. The judgment of the trial judge was based upon his reading of the above Act and he held that the plaintiff had no cause of action.

Held, that s. 250 gave the plaintiff no rights in this action. Sub-section 1 refers only to the future construction of railways, and not to those already constructed. It imposes a burden for which these companies were previously free unless where they had voluntarily assumed it as a matter of contract or otherwise. It has no retrospective effect. Appeal allowed and action dismissed with costs.

C. A. Moss, for plaintiff. W. L. Scott, for defendant.

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Boyd, C., Magee, J., Latchford, J.]

[June 2.

THOMPSON *v.* COURT HARMONY OF ANCIENT ORDER OF FORESTERS.

Benefit Society—Sickness—Certificate of medical officer—Domestic tribunal—Interference with by court—No jurisdiction to interfere with the decision of a benefit society unless the conclusion has been the result of corrupt motives.

Appeal by defendants from judge of the County Court of York in favour of plaintiff in an action by a member of the defendant court for \$168 for sick benefit.. The medical officer of the defendant society certified that the plaintiff's illness was due to alcoholism which under the defendants' rules deprived the plaintiff of any benefit. Another physician called in by the plaintiff certified that the illness was not due to alcoholism, but to something else; the defendants, however, acted on the certificate of their own medical officer. The County Court judge whilst

agreeing that the defendants could not pay in the face of the certificate of the defendants' medical officer held that as, in his opinion, alcoholism did not cause the plaintiff's illness, the certificate amounted to a legal fraud, although the officer had acted honestly and given judgment for the plaintiff.

BOYD, C.—The inquiry as to the man's condition was presented as usual upon the doctor's certificate, and considered upon all the materials that the plaintiff desired to submit. That something else was not done by him is not a ground for disregarding the conclusion of the defendants and their officers. There was really no exclusion of evidence, because there was no tender of it; and, upon the materials before the defendants, the conclusion reached was right. Nothing was laid before the defendants or the officers who found upon the claim to indicate that the opinion or judgment of Dr. Pyne was erroneous, or that, when the doctors differed, the later opinion was to be preferred to his. The defendants did not take steps to investigate the soundness of Dr. Pyne's opinion by original inquiries, but that is not a matter provided for; they dealt with what was laid before them; and it is no reason for displacing their conclusion or their jurisdiction that a subsequent investigation in a court of law has led to a different result. The matter is one to be disposed of by the methods of the Order to which the plaintiff subjected himself on becoming a member. The action of the defendants is final unless it is made to appear that such action is contrary to natural justice or in violation of the rules of the body or done mala fide, as said in *Essery v. Court Pride of the Dominion* (1882) 2 O.R. 596, at p. 608.

The judgment in appeal introduces a new and further exception, in that an erroneous medical certificate, given honestly, but by mistaken diagnosis, is, though not intentionally fraudulent, to be regarded as "legal fraud." But it needs mala fides or dishonesty to annul the finding of a domestic forum. Lord Bramwell has taken particular pains to exterminate the expression "legal fraud."

The English authorities point out that all the officers or persons selected to deal with claims and disputes are to be regarded as arbitrators, and in respect of their findings relief is to be given in courts of law or equity only when the persons designated have misconducted themselves or abused their powers. *Callaghan v. Dolwin* (1869) L.R. 4 C.P. 288, 295. These officers have nothing to do with getting up a case for a complainant or claimant or with getting witnesses or otherwise initiating any method of investigation beyond dealing with what is laid before them and

acting thereon to their best judgment—as was unquestionably done in this protracted controversy: *In re Enoch and Zaretzky Bock & Co.'s Arbitration*, [1910] 1 K.B. 327, 332.

In brief it may be said as to these society disputes, where the officials deal as best they can with the materials brought before them, it is not enough to say they have reached an erroneous conclusion or that they have upheld an erroneous certificate; it must further appear, to give a foothold to the ordinary courts of law, that the conclusion has been the result of corrupt motives; see *Armitage v. Walker* (1855) 2 K. & J. 211, and *Bache v. Billingham*, [1894] 1 Q.B..107.

I think that no jurisdiction exists, as to this claim of the plaintiff, to warrant the judgment of the County Court. It should be vacated and the action dismissed without costs.

*Rose, K.C., for plaintiff. Heyd, K.C., for defendants.*

## Province of Manitoba.

### COURT OF APPEAL.

Full Court.]            **LONGMORE v. MCARTHUR.**            [May 18.

*Negligence—Right of action by employee against contractor and sub-contractor—Recovery of judgment a bar to subsequent action.*

Appeal from judgment of MATHERS, C.J.K.B., noted, ante, p. 390, dismissed with costs.

Full Court.]            **ARDEN v. MILLS.**            [June 6.

*Contract—Repudiation before time for performance—Election to treat contract as ended except for the purpose of an action for breach.*

If B. repudiates his agreement to lease property from A. for a term to commence at a future date, A. may treat the contract as at an end except for the purpose of bringing an action for the breach of contract, and he may remain in possession during the whole of the term agreed on and then bring such action. *Johnstone v. Milling*, 16 Q.B.D., per Lord Esher, at p. 467, followed.

*McKerchar, for plaintiff. Sullivan, for defendant.*

Full Court.]

*HIGLEY v. WINNIPEG.*

[June 6.

*Negligence—Employer and workmen—Defect in ways, works, machinery and plant—Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 178—Negligence of foreman or person entrusted with duty of seeing that machinery and plant are in proper condition.*

The plaintiff, a carpenter in the defendant's employ under the superintendence of a foreman, was directed to assist in doing some work which necessitated the moving of a plank from one position to another in a frame building. The plank being above his reach when standing on the floor, the plaintiff, without specific directions from, and in the absence of the foreman, took a ladder about six feet long that was nearby, placed it in position, stepped on the lowest rung, held on to the top rung with one hand and with the other tried to raise the plank. In so doing the rung on which he was standing broke under the pressure, and the plaintiff fell upon some machinery underneath and was severely injured. The ladder was the property of the defendants. It was made of cross pieces or cleats nailed to studding but not "checked in," and had been frequently used on defendants' premises by the plaintiff and other workmen. In answer to questions submitted to them, the jury found that the ladder was defective, but they also in effect found that the plaintiff had been negligent in not using some other and safer method of reaching up to and shifting the plank.

*Held*, PERDUE, J.A., dissenting, that the ladder was a part of the ways, works, machinery and plant, which it was the duty of the foreman to see were in proper condition, that there was evidence to support the jury's finding that the ladder was not properly constructed and that the defect in it had not been remedied owing to the negligence of the foreman, thereby entitling the plaintiff to recover damages under ss. 3(a) and 5(a) of the Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 178, and that the jury's finding as to the plaintiff's negligence would not prevent such recovery.

*Held*, also, that the damages assessed by the jury (\$1,500), being well within the maximum allowed by the statute, were not excessive, and should not be reduced on the contention that the plaintiff had unreasonably neglected to follow the advice of a medical specialist. *Marshall v. Orient Steam Navigation Co.*, 79 L.J.K.B. 204, followed.

Per PERDUE, J.A.:—The plaintiff should be nonsuited because he had negligently adopted a dangerous method of reaching the

plank when several safer methods were open to him, without directions from the foreman to use the ladder and without taking care to see that the ladder was safe. *Cripps v. Judge*, 13 Q.B.D. 583, and *Weblin v. Ballard*, 17 Q.B.D. 122, distinguished.

*Hagel*, K.C., for plaintiff. *T. A. Hunt*, and *Auld*, for defendants.

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Full Court.] [June 15.

PRAIRIE CITY OIL CO. v. STANDARD MUTUAL FIRE INS. CO.

*Fire insurance policy—Condition requiring notice of loss to be given in writing forthwith.*

Appeal from judgment of METCALFE, J., noted, ante, p. 271, dismissed without costs as the court was equally divided; HOWELL, C.J.A., and PERDUE, J.A., being in favour of allowing the appeal, and RICHARDS and CAMERON, JJ.A., of dismissing it.

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#### KING'S BENCH.

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Mathers, C.J.] CANADA SUPPLY CO. v. ROBB. [May 27.

*Fraudulent conveyance—Proceedings to set aside—Sale of land to realize judgment—Affidavits and evidence—Gift from husband to wife made prior to incurring of debt.*

1. A motion under rules 742 and 743 of the King's Bench Act for an order to set aside an alleged fraudulent conveyance of land, and for the sale of the land to realize the amount of a registered judgment, is not an interlocutory motion within the meaning of rule 507, and affidavits grounded merely on information and belief are not sufficient to support such motion. *Gilbert v. Endean*, 9 Ch.D. 259, followed.

2. The only proper evidence of the registration of a certificate of judgment is a certified copy of it: *Massey-Harris v. Warener*, 12 M.R. 48.

3. Where the debt for which a judgment was recovered was incurred more than a year after the gift from the debtor to his wife complained of, and it was not shewn that the property conveyed constituted the whole or even a substantial part of the property owned by the debtor at the time, the conveyance should not be held to be fraudulent.

*Affleck*, for applicant. *Robson*, K.C., and *Bowles*, for defendants.

**Metcalf e, J.]****GRAVES v. HOME BANK.**

[May 27.

**Banking**—Release by customer of claims against bank—Monthly acknowledgment of correctness of balance.

The plaintiff's claim was for damages for an alleged illegal sale at a loss of certain goods hypothecated by him for advances. He subsequently, but before action, signed, either personally or by his authorized agent, nine or ten successive monthly acknowledgments of the correctness of the balances due to him as shewn by the books of the bank. These documents contained the following clause: "And in consideration of the account of the undersigned being not now closed, and subject to the correction of clerical errors, if any, the bank is hereby released from all claims by the undersigned in connection with the charges or credits in the said account and dealings of the said day."

**Held**, that, in the absence of any suggestion of fraud on the part of the bank in procuring such releases, they were sufficient in form to bar the plaintiff's action and, being founded on a sufficient consideration, were valid and binding upon him.

**Chalmers**, for plaintiff. **Minty**, and **C. S. Tupper**, for defendants.

**Me tcalfe, J.]**

[May 27.

**In re RURAL MUNICIPALITY OF SOUTH CYPRESS.**

**Liquor License Act**—Local option by-law—Municipal Act—Posting up notices of voting—Fixing time and place for summing up of votes.

**Held**, that s. 68 of the Liquor License Act, R.S.M. 1902, c. 1 Q1, should be construed as requiring the council of a municipality, in passing a local option by-law, to follow the directions of ss. 376 and 377 of the Municipal Act, R.S.M. 1902, c. 116, and therefore to provide for the posting up of notices of the voting and to fix a time and place for the clerk to sum up the votes, and that a local option by-law which did not make such provisions was illegal and should be quashed.

**Andrews**, K.C., and **Burbridge**, for applicant.

**Robson**, K.C., **Taylor**, K.C., and **Foley**, for municipality.

Prendergast, J.]

May 31.

*In re RURAL MUNICIPALITY OF SWAN LAKE.*

*Liquor License Act—Local option by-law—Municipal Act—Posting up notices of voting—Ballots marked with assistance of deputy returning officer—Secrecy of ballot.*

*Held*, 1. Sec. 66 of the Liquor License Act, R.S.M. 1902, c. 101, provides completely for the giving of notice of the voting on a local option by-law under the Act and there is nothing in the Act which incorporates the provisions of s. 376 of the Municipal Act, R.S.M. 1902, c. 116, so as to require the notices provided for by that section.

2. Sec. 68 of the Liquor License Act does not incorporate any provisions of the Municipal Act with respect to matters prior to the polling, especially the matter of notice of the voting which is independently and specifically dealt with in s. 66.

3. The vote of an elector who requests assistance in marking his ballot cannot be legally taken without strict compliance with s. 116 of the Municipal Act, and when four votes were so taken without the oath prescribed by that section, a by-law carried by a majority of only two should be quashed because without violating the secrecy of the ballot, it could not be shewn that a majority of the electors voted for the by-law.

*Andrews, K.C., and Burbidge, for applicant. Robson, K.C., and Foley, for municipality.*

**NOTE:**—It will be seen that the view of Metcalfe, J., in *Re South Cypress* is exactly the opposite of that of Prendergast, J., in *Re Swan Lake* on the question whether s. 376 of the Municipal Act is imported into the Liquor License Act by s. 68 of the latter Act. The *South Cypress* case is to be taken to the Court of Appeal.

Mathers, C.J.]

[June 2.

*IN RE RURAL MUNICIPALITY OF PORTAGE LA PRAIRIE.*

*Liquor License Act—Local option by-law—Form of ballot—Meaning of words “as soon as possible”—Recount—Failure to have polls open during prescribed hours—Appointment of scrutineers.*

*Held*, 1. The use of the form of ballot prescribed by s. 4(a) of 9 Edw. VII. c. 31, amending s. 68 of the Liquor License Act, R.S.M. 1902, c. 101, at the voting on a local option by-law, together with the directions for the guidance of voters in the form

prescribed by schedule F to the Municipal Act, is not a fatal objection to the by-law, notwithstanding the inconsistency of the two forms.

2. A few days' delay in publishing the notice of the voting on a local option by-law required by s. 66 of the Act will not be fatal, notwithstanding the section says it shall be done "as soon as possible" and the council of a rural municipality is not bound to make use of a daily newspaper published in an adjoining city because thereby the notice might be published a few days sooner.

3. A local option by-law may be given its third reading without waiting for the time for applying for a recount to elapse. *Re Coxworth and Hensall*, 17 O.L.R. 431, followed.

4. Sec. 65 of the Liquor License Act, as re-enacted by s. 4 of c. 26 of 7 & 8 Edw. VII., governs as to the time and place of the voting, superceding sub-s. (a) of s. 376 of the Municipal Act, R.S.M. 1902, c. 116, even if that section was incorporated into the Liquor License Act by the language of s. 68, as to which no opinion was expressed.

5. A delay of an hour in opening one of the polls, caused by a snow-storm, which prevented the deputy returning officer from reaching the polling station in time, should not be held fatal to the by-law if it is not shewn that the result of the voting was affected by such delay: Maxwell on Statutes, 4th ed., 564. *Re Oakland*, not yet reported, distinguished.

6. That the by-law did not provide for appointment of scrutineers as required by s. 377 of the Municipal Act was not a sufficient reason for quashing it after it was carried at the polls, when scrutineers were actually appointed and acted as such.

*F. M. Burbidge*, for applicant. *Robson*, K.C., for the municipality.

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Mathers, C.J.]

[June 2.

ANDERSON *v.* CANADIAN NORTHERN RY. CO.

*Railways—Negligence—Damages sustained by reason of the construction or operation of the railway—Limitation of time for action—Railway Act, R.S.C. 1906, c. 37, s. 306.*

The statement of claim alleged that the plaintiff was employed by the defendant company as a labourer and as such took part in blasting and in thawing frozen dynamite for that purpose under the order and directions of the defendant's roadmaster, that he was injured by an explosion of such dynamite, and that the defendant is a railway company owning and operating lines of railway

within the province and was guilty of negligence in certain particulars specified.

*Held*, on demurrer, that these allegations did not of themselves shew that the action was one to recover damages or injury sustained "by reason of the construction or operation of the railway" within the meaning of s. 306 of the Railway Act, R.S.C. 1906, c. 37, and therefore barred by the lapse of one year from the date of the injury.

*Deacon*, for plaintiff. *Clarke*, K.C., for defendants.

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### Book Reviews.

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*The Law and Practice of Civil Proceedings by and against the Crown and Departments of the Government.* By GEORGE STUART ROBERTSON, M.A., of the Inner Temple and Oxford Circuit, Barrister-at-law, Eldon Law Scholar, etc. London: Stevens & Sons, Limited, 119-120 Chancery Lane, Law Publishers, 933 pages.

We know of no law book which tells more of diligent and exhaustive research than the one before us, and there are few to compare with it in a masterly arrangement of the numerous subjects discussed, or where there has been more lucid treatment of difficult questions.

This work, as the author tells us, is the first attempt that has been made in modern times to deal comprehensively and practically with civil proceedings by and against the Crown and government departments. For practical use it supersedes all other works on the subject; and except perhaps for some matters of historical interest, leaves but little use for such works as Chitty's Prerogative of the Crown, published in 1820; West's Crown Practice in relation to Extents, published in 1817; Sergeant Manning's Proceedings at Law on the Revenue side of the Exchequer, in 1826; Fowler's Exchequer Practice, in 1827; Mr. Clode's book on Petition of Rights, in 1887, and some other minor works.

Mr. Robertson's large experience in connection with Crown practice has been a great help to him in the production of this comprehensive treatise, and we can easily imagine the time and labour and intelligence required, even by one so competent for the task as the author, to bring this varied information into the

**c o n v e n i e n t** form in which it now appears in the volume before us. We **n o t** ice, moreover, that Mr. Robertson has not hesitated when occasion required to state very freely his own opinion wherever the **a u t h o r i t i e s** seemed to conflict, or where there was no authority. This **b e i n g** done by one who is a master of his subject adds largely to the value of the work, and will help to settle doubtful points of practice.

Our readers have already seen something of his capacity in the **a r t i c l e** which recently appeared in this journal (ante, p. 100), entitled, "The Power Commission and the Attorney-General's fiat from the standpoint of the common law," in which Mr. Robertson shewed the indefensible character of the refusal of the acting Attorney-General of Ontario on an application **f o r** a fiat for an action against an emanation of the Crown on the **g r o u n d** that, "in his wisdom the plaintiffs would not succeed in **t h e i r** claim if he allowed them to go on." Further, that **w i t h o u t** right, precedent or authority he "constituted himself not **o n l y** a court which arrogates to itself the right to hear and determine questions of law and fact, and to supersede the ordinary courts," but also that he adopted "the novel and unprecedented method of interpreting a statute by deciding the matter **o n h i s** personal knowledge of what the legislature meant, and not **o n w h a t** it said."

The table of contents contains not less than 24 pages, and the index nearly 100 pages. This gives some idea of the mass of matter which required arrangement and elucidation.

The volume is divided into seven books entitled as follows:—

I. Civil proceeding by and against the Crown, members of the Royal family and government department. II. Proceedings of the revenue side of the King's Bench Division. III. Petition as of right. IV. Escheats. V. Other civil proceedings in which the Crown is a party. VI. Points of practice and proceedings. VII. Actions against Executive Officers of the government.

This book deals with matters as they exist at the present day and as modern conditions require them to be dealt with; the forms and precedents are also as far as possible modern, and have been apparently selected and arranged with great care.

**C o m p a n y L a w.** By WILLIAM FREDERICK HAMILTON, LL.D., K.C.  
3rd edition. London: Butterworth & Co., Bell Yard, Law Publishers. 1910.

of **T**his edition was rendered necessary by the repeal of the Act of **1907**, and the passing of the Companies (Consolidation) Act,

1908, which came into operation on the first of April, 1909. In addition to the matter contained in the previous edition there is a chapter dealing with actions and legal proceedings by and against companies; and the material sections of the Assurance Company's Act of 1909 have been incorporated. The principle adopted in the construction of the work has been to state the law in the form of general rules with examples from decided cases by way of illustration.

*Company Law. A practical hand book for lawyers and business men with an appendix containing the Companies Consolidation Act, 1908, etc.* By SIR FRANCIS BEAUFORT PALMER, of the Inner Temple. 8th edition. London: Stevens & Sons, Limited, Chancery Lane, Law Publishers, 1910. Arthur Poole & Co., Law Booksellers, Toronto, sole agents for Canada.

A standard work on a most important subject and one that is growing day by day. Whilst company law in this country does not conform in many respects to the English statute, a book such as this and that of Mr. Hamilton already referred to are necessary additions to every practicing lawyer's library and not only to them but to business men generally, for there are but few of them who can safely avoid the task of acquiring some knowledge on company law.

*Practice and Law in the Divorce Division of the High Court of Justice and on appeal therefrom.* By WILLIAM RAYDEN, of the Inner Temple, Barrister-at-law. London: Butterworth & Co., Bell Yard, Law Publishers. 1910.

This book comes to the public with an introduction from Lord Mersey, lately fifth president of the Divorce Division of the High Court of Justice, in which he says that he readily consented that it might be dedicated to him, being satisfied that it would be of great practical use to the profession, and that he was glad to have his name associated with it. He adds, "I have examined the proof sheets with some care, and I think that practitioners in the court will find the law and the procedure accurately stated, and so arranged as to be easily and quickly accessible." This is a sufficient recommendation of Mr. Rayden's very full and complete compendium of Divorce law in England.

Happily for us we have not much use for a book on this subject in this country: but those who have to deal with cases of this sort will find here all that can be said on the subject of practical value.

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## Law Societies.

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### LAW SOCIETY—SASKATCHEWAN.

Westerners are nothing if not practical and up-to-date. The Secretary-Treasurer of the above Society, writing from Regina, desires us to call the attention of our readers to the fact that his Benchers have authorized the institution by him of a register of vacancies for students and others, and correspondence is invited from all who meditate entry into a solicitor's office in that province, as clerks under article, with a view to qualify as solicitors and barristers. It is intended also to deal with applications from those who have knowledge of legal work and seek employment of that character. It is proposed to systematize this register, so as to make it as useful as possible to the profession in that province. Anyone desiring to take advantage of it is requested to notify the Secretary-Treasurer at Regina.

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### United States Decisions.

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A bank summoned as garnishee in an action against one of its depositors, may set off against the depositor's general account unmatured notes held by it at the time of the service of the garnishee summons, when it appears that the depositor is insolvent. (Supreme Court of Minnesota, Jan. 14, 1910.)

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### Flotsam and Jetsam.

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Samuel Untermeyer was being congratulated at the Manhattan Club on his recent successful conduct of a murder case.

The distinguished corporation lawyer modestly evaded all these compliments by the narration of a number of anecdotes of criminal law.

"One case in my native Lynchburg," he said, "implicated a planter of sinister repute. The planter's chief witness was a servant named Calhoun White. The prosecution believed that Calhoun White knew much about his master's shady side. It also

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believed that Calhoun, in his misplaced affection, would lie in the planter's behalf.

"When on the stand Calhoun was ready for cross-examination, the prosecuting counsel said to him sternly:

"Now, Calhoun, I want you to understand the importance of telling the truth, the whole truth, and nothing but the truth in this case."

"'Yas, sah,' said Calhoun.

"'You know what will happen, I suppose, if you don't tell the truth?'

"'Yas, sah,' said Calhoun, promptly. 'Our side'll win de case.'"—*Central Law Journal*.

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A colleague of the late Henry W. Paine approached him on one occasion with the offhand inquiry, "Mr. Paine, what is the law on such and such a subject?" The famous counsellor took out his watch, studied it a moment, and shook his head. "I don't know," he answered. "The Legislature hasn't adjourned yet."—*Boston Transcript*.

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In these teetotal days it is interesting to note the opinion of an old judge on water. On one occasion the bailiff of a court over which Mr. Justice Maule was presiding had been sworn to keep the jury locked up "without meat, drink, or fire, candles only excepted." One of the jurymen being thirsty asked for a glass of water and the bailiff asked the judge if it could be allowed. "Yes," said the latter. "it certainly isn't meat, and I shouldn't call it drink."—*Law Notes*.

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In their younger days Sir John A. Macdonald and Sir Oliver Mowat practised law in Kingston at the same time. The former was never oppressed with this world's goods, and, on one occasion, was being dunne by the latter for a claim due to his client, and he finally told him that unless he paid the amount or gave some good security, he would be compelled to sue for the amount. After some delay he received a letter from the debtor enclosing an endorsed note which he hoped would be satisfactory. The en-

dorser on the note was Mr. Mowat's father. It requires no great stretch of imagination to see how the genial maker of the note must have chuckled when in imagination he saw the plaintiff's solicitor examining the note.

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**HARDWORKING JUDGES.**—According to an English physician of high repute nobody works harder than a judge. "The most intricate mental processes," he says, "are in progress all the time he is hearing a case. He has, for instance, to analyze and dissect all that he hears. Nothing is more mentally fatiguing.

"No brain work that I can imagine could make greater demands. Not once, of course, must the judge's attention flag. If it does so, he is neglecting his duty. For this reason, a judge should never continue sitting when he is tired. A fatigued judge cannot, however, much he tries, keep the grip of a case that he does when he is mentally and physically fresh."—*Green Bag*.

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**A LITTLE TOO PREVIOUS.**—Judge Thrasher, county judge of Cattaraugus County, New York, has an exceptionally deliberate manner of speech. At a recent term of the County Court of that county, a certain W—— was convicted for a violation of the Liquor Tax Law. In the imposition of sentence, the judge said: "I will fine you \$200.00." Before anything further was said, the prisoner reached into his pocket and while taking out a roll of bills said, "I thought that would be about the size of it, and I have that money right here in my pocket." The judge thereupon concluded the terms of sentence as follows: "and three months in the Erie County Penitentiary. Have you got that in your pocket?"

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**JUST AS HE EXPECTED.**—Court had opened at one of the county seats of West Virginia when a member of the Bar strolled in, took a seat, put his feet on a table, and lighted a cigar. The judge called the bailiff and directed him to see that the attorney took his feet down and stopped smoking. The officer obeyed his instructions, and was requested by the lawyer to tell his honour to "go to —." Beckoning the bailiff to him the

judge inquired what it was the attorney had said, and the bailiff, somewhat reluctantly, delivered the message verbatim: "Yes," said the judge, thoughtfully, "I thought that was what the old scoundrel would say."

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SUFFICIENCY.—The following legal notice recently posted by a citizen of Hillsboro, N. H., calls for no comment:

"My wife, Margrette Cilley, and her children have flew the coop, and did not ask anybody; left my bed and board. I shall pay no debts of her contracting after this day, and any man trusting her on my account will be the loss for you.

"No reward offered for their return.

"Wife wishes her mail addressed to Miss Margrette Clark, leave off the Cilley. Thus it will please her and I am satisfied.

"O, yes! I have been married plenty, now.

"FRANK C. CILLEY."

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The inventor of the finger-print system of identification will be gratified to learn that even the criminal classes are beginning to have a flattering appreciation of his invention. A man was tried recently by a county Wicklow petty sessional court for the larceny of money from a church. An expert on the subject stated that he had examined a small pane of glass from the church window, which had on it finger prints. He found that these marks corresponded with a right forefinger print in his office which belonged to the prisoner. During the hearing of the case, some general remarks were made by the magistrates and the witnesses as to the usefulness of the system. The prisoner joined in the conversation, and declared with every mark of fervour that the finger-print system for the detection of criminals was the most wonderful invention of the day. He then proceeded to add, incidentally, that he threw himself on the mercy of the court. The court expressed itself as satisfied with the prisoner's views as to the finger-print system, but returned him for trial at the assizes.

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## *THE INDEPENDENCE OF THE BENCH AND EXTRA JUDICIAL DUTIES.*

For many years back the safeguards on which the public have been wont to rely for securing the independence, the purity, and the dignity of the Bench, have been gradually giving way to other considerations. No longer can our judges be regarded as a body apart from and above the rest of the community, removed from all temptations of personal advantage, or political advancement, chosen as possessing special qualifications which they were prepared to devote to the public service, content in the emolument provided, and satisfied that in the discharge of the important duties of their office, they could attain a position than which none could be more useful to their fellow subjects or more honourable to themselves.

Far from such being the case the Bench nowadays is too often looked upon as a reserve of rather able men who, for various reasons have gone into temporary retirement, but whom government in difficulties or a party in distress may draw upon to obtain the special instrument required to meet the emergency.

The example set us by the Liberals when they induced Sir Oliver Mowat to leave the Bench, which he adorned, to become their leader in a party fight, and followed by Sir John Macdonald who took a similar course for the purpose of strengthening his own administration, has led to the practice now quite common of looking to the Bench for political leaders. What the Liberals have this year done in Alberta the Conservatives have done in the Dominion. Both parties have thus adopted a course which makes the position of a judge not one of the highest and most honourable in which a member of the legal profession can attain, but a mere stepping stone to political advancement.

Nothing can be conceived more likely to lower the position of the Bench in public estimations, and thus weaken its influence and impair its usefulness than the action to which we have re-

fferred and another phase of the subject which is now forced upon our attention.

More than once governments have taken judges from their proper sphere of duty to work of a more or less political character and always with injurious results to the character and standing of the judiciary. The latest development of this practice has been the appointment of Chief Justice Meredith as Provincial Commissioner to prepare legislation to compensate workmen for injuries received during employment. This may seem a very simple matter, but it is one requiring grave consideration and opens the door to a wide field of discussion, not only in relation to the Bench of the Province of Ontario, but also to that of the Dominion and all its Provinces.

In the present case the appointment of a judge actively engaged in his judicial duties to such a duty as that referred to is in our opinion open to serious criticism from a constitutional point of view. Personally, of course, no objection to the selection could be made, assuming that with the many interests which already engage the attention of the learned Chief Justice he can spare time for such a task as that imposed without interfering with the regular duties of his office. But it is submitted that the office of a judge is to administer law, not to enact it. The two positions are entirely distinct, and cannot be properly united in one functionary. Under our system of government every law governing the body politic must be enacted by the Legislature and must be discussed and considered by that body, and will be treated from a party point of view. The measure which it is proposed shall be thus introduced will have its maker's stamp upon it and must necessarily bring him into any controversy that may arise, and it must be remembered that the subject is one of a highly controversial character. Controversial not only as relating to questions of policy and therefore political, but controversial also as concerning the great issues between labour and capital, and the mutual liability of employers and employed, out of which the most bitter hostility has arisen and may arise again, questions which a judge may properly be called upon to adjudicate when presented in the form of

statutory enactment, but which he should not be called upon to deal with as a legislator. Then it would appear from what the Premier has said that the commission will be called upon to give "all possible opportunity to individuals and bodies interested in the subject to present and urge their views of what the law should be." This is a sort of roving commission quite incompatible with the position of a judge and to which he cannot do justice without neglecting the duties which properly belong to his office.

There is, moreover, no necessity for taking the course adopted by the government. There are men in the profession fully competent for the work that is required and to whom it would be more properly entrusted if the law department of the province has not the time to make the necessary investigation or does not feel competent to grapple with it. When a report has been obtained "as to the laws relating to the liability of employers to make compensation to their employees for injuries received in the course of their employment which are in force in other countries, and as to how far such laws are found to operate satisfactorily," (a task very easily accomplished), there is surely sufficient capacity in the government itself to report a bill embodying "such changes in the law as in their (not his) opinion should be adopted." If they are not competent to do this work they should not undertake it. In other words the government of the day should assume the whole responsibility of obtaining the desired information and of preparing any necessary legislation. They should bring the measure before the country entirely as their own and not take shelter under the robe of a chief justice. If this is not what such a commission means what does it mean?

It would be quite proper for the government to consult the judges from time to time as to defects in present legislation and to ask for such suggestions as their experience might enable them to give. In other words, there could be no possible objection to an arrangement by which the opinion of the judges could be obtained for such a purpose. It is customary for them to state

their views on such matters in England, and it might well be done here. In fact such opinions might often be the most valuable part of the evidence received by a commission or committee charged with the task of revision. But that is quite a different thing from taking the head of a court from his proper duties to do work, part of which at least would be to act as a sort of referee in what would be a contest between capital and labour to the detriment of the dignity of his high office.

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#### *DRIFTING.*

"I feel there is getting abroad amongst Canadians a sense that is not of very great importance after all that crime should be punished, and that it is a pity to punish those who have committed crime, and that means should be taken to effect escape of those who are undoubtedly guilty. That is a very false sympathy which has been the curse of a great part of this decade. We have to determine whether life and property shall be secure in the English sense in which it has been for a century, or whether we are to deteriorate to that course of civilization which characterizes some of the States in the adjoining country."

Such were the words addressed by Mr. Justice Riddell to the grand jury of the county of York in the Province of Ontario at the opening of the late Assizes. If the learned judge be correct in the opinion thus expressed, Canada is in danger of losing what is, even in an economic sense, one of her most valuable assets. As much as the possession of vast natural resources in the fertility of her soil and the wealth of her minerals, her reputation as being a well-governed, an orderly, law-abiding, and a law-respecting community, has been the means of bringing within our boundaries a large number of settlers of the class best qualified to develop the natural wealth of which we are so fond of boasting. That reputation we cannot afford to lose, not only for the benefits it brings to us, but still more for its effect upon the character of our rising population. The spirit of order and obedience must be maintained, not only in the administration of justice, but in the

family life of our people. Sad as must be the confession, and yet there can be no doubt of the fact, the home is no longer the school in which the elementary principles of respect for and obedience to constituted authority are taught. Respect for parents, which is the foundation stone of all authority, is neither enforced nor respected, and, failing that, all effort to maintain in wider spheres that regard for law and order so essential to the well-being of a country must of necessity be fruitless.

Of the prevalence of serious crimes against the person we have in the columns of the daily press evidence which cannot be denied, and should not be disregarded. Scarcely a day passes in which we have not the record of some deadly crime for which no adequate reason can be assigned, or provocation alleged. Wilful murder, frequently followed by suicide, may almost be said to be a common occurrence.

On the one hand we have the recklessness with which human life is assailed, and, on the other, the sentiment which shrinks from the punishment of the man or woman who do not hesitate to take that life for the gratification of passion, the lust for gain, or on the specious plea of self-defence. The frequency with which jurors excuse the most serious crimes on the plea of insanity is evidence of this.

How strangely this contrasts with the religious activity which is one of the characteristics of the present age, and which certainly is both sincere, and well directed, and in accordance with the teaching of Christianity. Zeal in missionary and philanthropic work is to be commended, but there is evidently something wanting which zeal in those directions does not provide.

There can be no doubt that the possession and handling of deadly weapons, such as the revolver and the knife, often lead to their use under circumstances which, but for their presence, would not be attended with fatal, or even very serious results. The man with a revolver in his pocket will be very apt to use it if involved in a quarrel which otherwise would be settled by a blow of the fist. The police would be doing a good work if they took a little more trouble in compelling the observance of the law with regard to such weapons.

Again Mr. Justice Riddell asks whether "property" shall be secure in the English sense. Among a large class of people in this country there is, to say the least of it, no delicacy of feeling with regard to the property of other people. The public are not held to have any rights when it suits the convenience of some person, or some corporation, to interfere with them; and, in turn, the public have no compunction in trampling upon private rights which come in the way of their profit or enjoyment. A railway company or a municipal corporation will neglect the most ordinary precaution for the protection of the public, or a picnic party, bent upon amusement, will enter upon your grounds, break down your fences, open your gates and complacently depart without any thought of making compensation or even offering an apology.

The same sort of spirit is in evidence in another and a higher sphere where the example and effect must be much more harmful to the state. Our Provincial Legislatures apparently have absolute control of our property and our fortunes. They are not amenable, as we are informed from the judicial bench, even to the law of the eighth commandment, and they claim the right to wield and sometimes do wield, a power which even the Imperial Parliament does not assume to exercise. It is said they have not hesitated, in order to carry out a policy of their own devising, to violate rights, public and private, secured by so venerable an authority as Magna Charta. Private property has been most injuriously affected by the violation of pledges given for its security. The authority of the courts has been set aside and their doors closed against suppliants for justice. In short, great principles of law or justice have been recklessly disregarded, and that by those in high places. These things may all have been done with the best intentions, and we might admit that they were; but that forms no excuse; nor is it any excuse that these things were intended for the public benefit; for that is just where thoughtful men at once take issue. It is never for the good of the state that its rulers should act unjustly, or, without ample compensation, disregard minority rights, or in any way shew an example of

that which would as between individuals be properly designated as lawlessness.

The sad part of all this is not so much the monetary loss to private individuals or their feelings of outraged justice, nor that a Government may have brought discredit upon the country; but, more than all this, is the fact that most people seem to be perfectly indifferent, some of them even applauding acts which, if done to themselves, would be most strongly reprobated. We talk very loudly about the country's prosperity and perhaps do too much bragging, forgetful that the lax tone and departure from the old paths of national righteousness, the indifference of the public as to the fundamental principles of *meum* and *tuum*, and the false sympathy above referred to point to national disaster in the future. Surely this is a matter of too much moment to pass unnoticed.

#### *DISSENTING JUDGMENTS.*

It is not mentioned as a matter of news, for it is as old as the hills, that those who occupy judicial positions are always subject to and receive ample criticism from the Bar. Peculiarities of mind, manner, temper and person constantly and naturally come up for discussion and comment. In this respect judges might naturally be expected to seek the gift to see themselves as others see them, a gift which, by the way, would be as useful for us as for them. We are led to this midsummer maundering by reading the judgments of the Court of Appeal for Ontario which appear in some recent numbers of the *Weekly Notes*. More than one judge has in days gone by established for himself a reputation as a "hanging judge." Why should not others be known as a "dissenting judge" or as a "dilatory judge." We remember a well-known counsel in former days who was nicknamed "Stephen the unready," but perhaps fortunately, although an excellent lawyer, he never arrived at the Bench. As to those who have acquired the "dissenting habit," one learned judge of the Court of Appeal dissented not less than

nine times in the delivery of about thirty judgments, whilst the remaining judges altogether appear to have only dissented on two occasions. This perhaps was indicative of their extreme modesty and diffidence. In the Supreme Court dissent may almost be said to be rampant. Whilst the Bench and Bar may have their harmless and playful vacation jokes about such matters, there is a serious side to the situation, in this, that the public are apt to lose confidence in the administration of justice when the uncertainty of law is thus unnecessarily forced upon their attention. We admit that there are difficulties in the way and some reasons against it, but might it not in this view of the matter be desirable, and thereby perhaps save many appeals, if only the judgment of the court as a whole should be delivered, and that all dissent should be thrashed out or known only in the judges' consultation room. Most certainly this should be so in courts of final resort. The Supreme Court, for example, would, we submit, lose nothing in respect and authority if such a rule should be enforced.

*AVIATION AND WIRELESS TELEGRAPH AS RESPECTS  
THE MAXIMS AND PRINCIPLES OF THE  
COMMON LAW.*

The maxim *cujus est solum ejus et usque ad coelum*—whose is the soil, his it is even to the sky—did not, when we took our common law from England, carry any thought of human occupation of the superincumbent air, unless by structures attached to the soil. It was intended, as we think the common law, viewed as a system, demonstrates, to indicate that the owner of the soil had the right to forbid the plane above him being used to his detriment.

But movement across this plane was not conceived to be injurious actually or technically to any right of the owner of the surface below. The word *surface* itself in distinguishing an upper from a nether estate in land implies a several sort of enjoyment.

The further maxim quicquid plantatur (fixatur) solo, solo cedit—whatever is affixed to the soil belongs to the soil—and its kinfellow, omne quod solo inaedificatur solo cedit—what is built on the soil pertains to the soil—enforce the fixtures theory as the strict limit in land ownership.

All of us are acquainted with the decoy case which assumed, that one had the right to establish a business in attracting ducks flying through the air, from all directions, and it could not be interfered with by another standing even on his own soil and maliciously discharging guns. *Keeble v. Hickerlingill*, 11 Mod. 74, 131.

It is not an answer to distinguish this case by saying that the flying of birds is one of the things in nature with which no ownership of property was ever expected to interfere except by actual occupancy. The point is that the owner of the decoy was using for his private profit that part of the air which another could exclusively occupy.

It would yet be considered something of a fantastic claim for one who held land on the four sides of another to assert, that the latter could not maintain feeding grounds to attract wild fowl, because he was inviting aerial trespass across the objector's soil. And yet the claim would be not without merit, if it could be established that birds came in such clouds as to damage him, by temporarily alighting on his soil, or crops or trees.

This would be as if the inner owner of the soil had set lures to attract herds of beasts so that they would trample up the surrounding soil.

In Broom's Legal Maxims, page 397, Lord Ellenborough is reported to have ruled that an action of trespass was not maintainable for one nailing a board to his own wall so that it overhung plaintiff's close, but an action on the case. He reasoned that, if it were trespass to interfere with the columns of air superincumbent on the close, then any aeronaut would be liable at the suit of every occupier of a field over which his balloon passed, as trespass would not regard the length of time the air would be invaded. This illustration was intended to demonstrate

that to invade a close by an overhanging structure could not be trespass, because this led to an absurdity, to-wit, trespass in fugitive occupancy of the air. But invading a close for an instant by doing anything to the soil or to what is planted in, or built upon it, or grows out of it, is trespass. Running across or stopping within the soil surface of a close is not differentiated in any respect. Therefore, according to Lord Ellenborough, it is not the same thing to invade one's atmospheric plane as his soil possession.

Take the distinction of plucking fruit from a tree being trespass and taking and carrying it away after it has fallen being larceny. It has become in the latter case personal property because it is not attached to the freehold. But it is as much attached to the superincumbent air in the one situation as the other. It is impregnated, so to speak, with some freehold in every place it is, if, literally, a freehold extends to the sky, and nothing could be severed therein. If one bottled up some of the superincumbent air of A.'s freehold it would be going to an extravagant length to say he was committing larceny, but it would seem no less ridiculous to assert he was trespassing. If he took away A.'s soil or cut down his trees or drained his pond or carried away his mineral water, his act would be trespass.

All of truth there seems to be in the maxim of ownership to the sky is, that within lines extended through all points of soil ownership to the sky is a space of preferential use to the owner of the soil and such use is interfered with only when enjoyment of the soil is diminished.

On this theory a nuisance is abatable when it fills that space with noxious odors, or with concussion that shakes to their damage structures affixed to the soil; but any mere stirring of air that works no harm to occupancy of the soil has, we venture to assert, never been made the basis of any claim in a court.

It has been held, that the common law rule of cattle pasturing upon land whether open or enclosed has not been regarded as applicable to the condition of things in this country, and therefore it is not trespass here for cattle running at large to go upon,

and pasture in, open land. *Buford v. Houtz*, 133 U.S. 320; *Davis v. Davis*, 70 Tex. 123. It was argued in the *Buford* case that this right of general pasturage enured to the common benefit and was given and taken upon an implied understanding that inhered in our very titles.

One can hardly doubt, that, had aviation been known and utilized as rapid advancement promises it is on the way of being known and utilized, a similar understanding, based on the same character of common benefit, would have secured its right into all open spaces above the soil. It would be far within the principle, that one for his private gain may draw fowl ferae naturae across the air above another's soil, to hold that science discovering public highways through the same element is within its legal rights. This is a conquest that civilization has far more right to claim than superiority in land title over savage tribes.

In *Guille v. Swan*, 19 Johns. 381, 2 Hughes' Gr. and R. 528, an aeronaut was held liable in trespass for damage done by his being dragged by a balloon through plaintiff's field and also for that of the crowd breaking in to rescue him from his peril. The judge said: "I will not say that ascending in a balloon is an unlawful act, for it is not so; but it is certain the aeronaut has no control over its motion horizontally; he is at the sport of the winds and is to descend when and how he can; his reaching the earth is a matter of hazard." Then it was concluded he was responsible, because the consequences that ensued should have been foreseen. But the suggestion that he had no right to invade the air of whomsoever's close is impliedly repudiated. It would seem, that aviation has already placed itself beyond the application of the language we quote.

Wireless telegraphy uses air columns above earth planes in essentially the same way as does aviation. The only difference is that in the latter case the substance carried is more corporeal, so to speak. But what is carried by each method is something tangible and capable of being weighed and measured. If science attains the goal of its desire neither will be astray in its element,

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or, as we might say, *ferae naturae*. Either may be intercepted, as wires transporting other telegraphy may be tapped. Between them we perceive no difference in plucking a Marconigram from the air for appropriation and capturing an aeroplane and calling it your own.

If they were even trespassers to no one accrues the right of use or confiscation. If, as was held in *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645, fruit cannot be appropriated by the owner of the soil when taken from the overhanging bough of a tree belonging to the adjacent soil, *a fortiori* it seems to us, these coursers of the air do not lose their ownership.—*Central Law Journal.*

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#### VALIDITY OF INDEMNITY INSURANCE CONTRACTS.

Even the best courts sometimes go astray. Failing to hitch their frail wagons to some fixed star in the judicial firmament they become lost in by-paths of their own creation and other courts following in their uncertain footsteps, suffer the fate of that court which first led into error. But worse than that, these self-distrusting courts, following each other so blindly into the ditch, serve as they run, to kick up a great cloud of dust which, for a better term, we call the "great weight of authority" and which is so compelling in its attraction for both courts and lawyers.

Follow the cloud! Follow the crowd! Where the greatest number tramp must be the right road. Not always. There's a further question—Who's the leader? When he took this short cut, did he seem to know where he was going? Herein lies the danger of judicial precedent. Unless a court is unable to escape the cumulative effect of precedent it becomes a snare to trap the unwary and to still the questionings of the sincere judicial mind.

Take the case of a contract to indemnify one for the consequences of his violation of the law. Is such a contract good or is it void because the consideration is illegal? We pick up that

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great index to the fixed stars of independence, Hughes' Grounds & Rudiments of Law, and turning to the alphabetical heading of illegality we are put in possession of two great maxims.

**Ex turpi contractu non oritur actio.**

**Salus populi suprema lex.**

Holding fast to these two fixed stars which are forever true in all ages and for all time, we are ready to say that if whatever fails to come within the description of these maxims is absolutely void and should not escape our condemnation because of other considerations, of business or otherwise, which seem to support it.

From these great maxims we are led to the first great case, one which is called a leading case, not only because it was the leader in a new departure but because it was a good leader. The court knew the way it was going and gave good reasons in harmony with the great principles of justice.

This case is none other but the great case of *Collins v. Blanttern*, Wils. 341, 1 Smith L.C. 715, Hughes G. & R. 436. It held that a contract of A. to indemnify B. for the results of breaking the common law was a void contract. We see easily why this must be so. **Salus populi suprema lex**, demands that no contract shall encourage a result that will in any manner affect the salus populi. This contract does so, for it encourages B. to commit an infraction of law. It is therefore tainted with illegality because it violates a fundamental principle of law and public policy. An action based thereon is therefore "ex turpi contractu," and must fail.

Now, we make more definite our assumed contract. A. promises B. to indemnify him if he B. suffer judgment in a civil action for damages for violating some statute, for instance, the Safety Appliance Act. This Act is in the interest of salus populi and requires the use of certain appliances which increase the safety of passengers and servants of railroad companies. B. is a railroad company and does not wish to obey this law or become liable for damages if he disobeys it (which, by the way, is the same thing, for where the law has lost its sanction it is no longer binding upon the consciences of men). At this interesting

moment A. comes along and tells B. that for a small annual payment, he will remove the sanction of the law, to wit, its penalty, himself becoming liable therefor, or what is the same thing, refunding to B. all the consequences of his unlawful act. B. feels much encouraged. No longer is he so careworn and anxious lest through some negligence he shall violate the law by failing to adopt the new devices, because, for him, the law has lost all terror, its sting has gone and he can operate to some extent independently of its commands.

Does not the mere statement of this proposition carry irresistibly its own conclusion? The Safety Appliance Act is passed in the interest of the *salus populi* and that great maxim (a fixed star of jurisprudence) immediately controls the result. A.'s contract encourages B. to violate that statute as much as A.'s contract in the case encouraged B. to violate a criminal statute, because in either case, the contract of indemnity practically, though not theoretically, removes the sanction of the law. That being the effect of the contract, from that moment the *salus populi* is endangered. The contract becomes tainted with a hopeless illegality and the great maxim we quoted at the beginning sweeps up the refuse and wipes it off the boards—*Ex turpi contractu non oritur actio*.

If this is convincing, why need authority? Why be slaves to precedent? No matter who it hits, the court that first went off into error was blind to general principles. There were no stars to guide and no fixed lights to lead into any safe harbour, but into utter darkness the court went stumbling on its way and after it went other courts, equally blind, and all have fallen into the ditch.

In the splendid article in this issue by Judge Needham C. Collier, we discuss fully the fundamental error in the decision on this question and we cite all the decisions of many respectable courts who have raised the great cloud of dust which has blinded the eyes of the profession, but above and beyond them all we have shewn one jurist who refused to be coerced by any "weight of authority" whose eyes scanned the heavens for some fixed

star to guide him out of what he believed was a most atrocious error and in a most magnificent opinion in the case of Breeden v. Frankfort, etc., Insurance Company, 220 Mo. 327, 119 S.W. 576, Judge A. M. Woodson leads in a conflict against a "weight of authority" that would daunt an ordinary jurist. All honour to such judges!

The trouble with our courts to-day is that they are not intimate enough with the great maxims and the great leading cases wherein are imbedded the really few great principles of justice. Too frequently the expediency of business or private gain or convenience, will lead such courts to ignore great immutable, unchangeable principles of jurisprudence, which, because of the fact that they are forever true, continually embarrass their detractors into error and forbidden paths.

Indemnify contracts insuring against loss for negligence or any other violation of law are illegal contracts absolutely unenforceable in any jurisprudence that has any respect for the great universal maxim, *salus populi suprema lex*. And our voice shall be forever raised against such contracts and against the business of those companies which encourage the extension of this character of insurance on the ground that such insurance is a continual menace to the public safety and violative of every sound principle of contract legality.

Let the courts wake up, and not regard so highly the "business interests" of the country, especially where such interests are opposed to the "safety of the people." The later consideration becomes the "supreme law" of the land which the courts are charged to enforce.—*Central Law Journal.*

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**REVIEW OF CURRENT ENGLISH CASES.**

(Registered in accordance with the Copyright Act.)

**ADMIRALTY—COLLISION—TUG AND TOW—DAMAGE BY TOW  
THROUGH NEGLIGENCE OF TUG.**

*The W. H. No. 1 and Knight Errant* (1910) P. 199. This was an admiralty action to recover damages occasioned by a collision which took place in the following circumstances: W. H. No. 1 was a barge in tow of the tug *Knight Errant*. Through the unskilful management of the tug the barge under the influence of wind and tide drifted to leeward, so that those in charge of the barge though making reasonable efforts by porting the helm to get to windward failed to avoid the danger, and the barge ran into and sunk a lightship. Bigham, P.P.D., held that both tow and tug were liable, but the Court of Appeal (Lord Halsbury and Moulton and Farwell, L.J.J.) varied his decision, and held that the tug alone was liable.

**VENDOR AND PURCHASER—CORPORATION—RESTRICTIVE COVENANT  
—ULTRA VIRES.**

*Stourcliffe v. Bournemouth* (1910) 2 Ch. 12. In this case the defendants a municipal corporation had acquired by purchase from the plaintiffs under statutory powers, a parcel of land for the purposes of a public park. The defendants had entered into a covenant with the plaintiffs not to erect upon the lands so acquired any buildings except such structures as summer houses, a band stand or shelters, not more than 12 feet high. The defendants having proposed to erect two lavatories and urinals the plaintiffs objected that such structures would be a breach of the covenant, whereupon the defendants altered their plans by adding an open shed between the two lavatories, which they called a shelter. The action was brought to restrain the erection. The defendants contended that the covenant in question was ultra vires and void, but Parker, J., held that the covenant was valid so long as it did not restrict the defendants from using the property for the purpose for which they were authorized to acquire it; and his decision was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Buckley and Kennedy, L.J.J.).

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**DESIGN—"NEW OR ORIGINAL"—REGISTRATION.**

*Dover v. Nürnberger* (1910) 2 Ch. 25. The plaintiffs, a firm of cycle accessory manufacturers, registered a design for hand grips for cycle handles. The design consisted of an engine-turned pattern in wavy lines applied to the grip and broken up into panels by deep longitudinal grooves. The engine turning was a common pattern and none of the details of the design were new. The action was brought to restrain its infringement, and Warrington, J., held that the design was "new or original" and granted an injunction, but his decision was reversed by the Court of Appeal (Cozens-Hardy, M.R., and Buckley and Kennedy, L.J.J.).

**VENDOR AND PURCHASER—FORM OF CONVEYANCE—DESCRIPTION BY  
REFERENCE TO PLAN—RESTRICTIVE WORDS.**

*In re Sparrow & James* (1910) 2 Ch. 60. This was an application under the Vendors and Purchasers Act. The property in question was offered for sale by auction under printed conditions to which a plan was attached, but it was stated that the plan was for reference only; and that there was no guarantee that it was accurate in any particular, but that it was believed to be accurate, and there was no express provision as to the form of conveyance. The purchaser prepared a conveyance in which the property was described by reference to a plan, as follows: "which said premises are more particularly described in the first schedule hereunder written, and with their respective quantities and boundaries are indicated or shewn on the plan drawn on the back of these presents, and therein surrounded by a red verge line"; and the vendor proposed to insert after the word "boundaries" the words "by way of elucidation and not of warranty," to which the purchaser objected. It appearing that the description of the property was insufficient or unsatisfactory without reference to the plan, and it not being shewn that the plan was inaccurate, Farwell, J., held that the vendor was not entitled to insert the qualifying words, and that the purchaser was entitled to have the property described by reference to the plan.

**TRADE MARK—REGISTRATION—LATIN WORD.**

*In re Aktiebolaget & Co.* (1910) 2 Ch. 64. This was an application referred to the court by the registrar of trade marks.

The applicants desired to register the word "Primus" as a trade mark for their paraffin stoves. The application was opposed by the Board of Trade. The word had been used by the applicants in connection with their stoves since 1893, and Eady, J., without deciding that the word was a distinctive mark of the applicants' goods, held that the word was one which might properly be the subject of a trade mark, and he, therefore, simply directed the registrar to proceed with the application.

**WILL—BEQUEST OF RESIDUE—"EQUALLY BETWEEN STATUTORY NEXT OF KIN"—PER STIRPES OR PER CAPITA.**

*In re Richards, Davies v. Edwards* (1910) 2 Ch. 74. In this case a testator had bequeathed his residuary estate "for and equally between" the persons "who at my death shall be my next of kin according to the statutes for the distribution of the estates of intestates," and an application was now made by the executors and trustees to determine whether according to the proper construction of the will the next of kin were to take equally or per stirpes. Eady, J., held that as there was no reference in the will to the statutory mode of distribution, and the statutes were only referred to for the purpose of defining the class, the word "equally" must have its full effect, and the statutory next of kin were entitled per capita.

**PRACTICE—CLAIM AND COUNTERCLAIM DISMISSED WITH COSTS—COUNTERCLAIM—COSTS—FORM OF JUDGMENT.**

*In James v. Jackson* (1910) 2 Ch. 92, the claim and counterclaim were both dismissed with costs, and Warrington, J., was called on to decide what is the proper form of the judgment in such a case. As prepared by the registrar the judgment provided that the taxing officer was to tax the defendants costs of action except so far as they had been increased by the counterclaim, and to tax the plaintiff's costs so far only as they had been increased by the counterclaim, and set them off, and directed the balance to be paid by the party found liable. This was held not to be the proper form and as settled by the judge, the action was dismissed with costs to be paid by the plaintiff to the defendant, and the counterclaim was dismissed with costs to be paid by the defendant to the plaintiff, and it was referred to the taxing officer to tax the defendant's costs of the action and the plaintiff's costs of the counterclaim which were ordered to be set off, and the balance paid by the party found liable.

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**ESTATE TAIL—DISENTITLING ASSURANCE—PROTECTOR OF SETTLEMENT—CONSENT OF PROTECTOR OF SETTLEMENT—TENANT IN TAIL ALSO PROTECTOR—FINES AND RECOVERIES ACT, 1833 (3-4 W.M. IV. c. 74), ss. 34, 42—(10 EDW. VII. c. 52, ss. 9, 19 (ONT.)).**

*In re Wilmer, Wingfield v. Moore* (1910) 2 Ch. 111, a rather unusual state of facts existed, a tenant in tail was also himself entitled to a life estate by virtue of which he was protector of the settlement, being desirous of barring the entail, he executed a disentailing deed, which, however, contained no formal consent on his part as protector of the settlement, but Neville, J., held that his execution of the deed operated as a consent by him as protector of the settlement and was effectual to bar all remainders expectant on the estate tail.

**SET-OFF—MUTUAL DEBTS—ASSIGNMENT TO DEFENDANT OF DEBT OWED BY PLAINTIFF—SET-OFF BY DEFENDANT OF DEBT ASIGNED—JUDICATURE ACT, 1873 (36-37 VICT. C. 66), S. 25(6)—(ONT. JUD. ACT. S. 58(5)).**

*In Bennett v. White* (1910) 2 K.B. 1, strange to say, the question has been presented for decision, apparently for the first time since the passing of the Judicature Act, whether a debt assigned can be set off by the assignee against a debt owed by himself to the debtor. The case was tried before a recorder, who held that the debts could not be set off, and a Divisional Court (Darling and Bucknill, JJ.) also held that the debts are not mutual and therefore cannot be set off; but we notice that this decision has been since reversed by the Court of Appeal: see 129 L.T.J. 181.

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 REPORTS AND NOTES OF CASES.
 

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 Dominion of Canada.
 

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 SUPREME COURT.
 

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Alb.]

[June 15.

CALGARY &amp; EDMONTON RY. CO. v. MACKINNON.

*Expropriation—Form of award—Evidence—View of property—Proceeding on wrong principle—Disregarding evidence.*

In expropriation proceedings, under the Railway Act, the arbitrators in making their award stated that they had not found the expert evidence a valuable factor in assisting them in their conclusions and that after viewing the property in question, they had reached their conclusions by "reasoning from their own judgment and a few actual facts submitted in evidence." On appeal from the judgment of the Supreme Court of Alberta setting aside the award and increasing the damages,

*Held*, that it did not appear from the language used that the arbitrators had proceeded without proper consideration of the evidence adduced or upon what was not properly evidence, and, therefore, the award should not have been interfered with.

Appeal allowed with costs.

*Hellmuth, K.C., and Curle, for appellants.*

*Chrysler, K.C., and Travers Lewis, K.C., for respondent.*

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 Railway Board.]

[June 15.

GRAND TRUNK RY. CO. & CANADIAN PACIFIC RY. CO. v. FORT WILLIAM.

*Board of Railway Commissioners—Jurisdiction — Municipal streets—Railway upon or along highway—Leave to construct—Approval of location—Condition imposed—Payment of damages to abutting landowners—Construction of statute.*

Having obtained the consent of the municipality to use certain public street for that purpose, the railway company applied to the Board of Railway Commissioners for Canada for leave to construct and approval of the location of the line of their railway upon and along the highways in question. None of the lands abutting on these highways were to be appropriated

for the purposes of the railway, nor were the rights or facilities of access thereto to be interfered with except in so far as might result from inconvenience caused by the construction and operation of the railway upon and along the streets. In granting the application the Board made the order complained of subject to the condition that the company should "make full compensation to all persons interested for all damage by them sustained by reason of the location of the said railway along any street." On appeal to the Supreme Court of Canada,

*Held*, DAVIES and DUFF, JJ., dissenting, that, under the provisions of s. 47 of the Railway Act, R.S.C. 1906, c. 37, the Board had, on such application, the power to impose the conditions directing that compensation should be made by the company in respect to the damages which might be suffered by the proprietors of the lands abutting on the highways of the municipality upon and along which the line of railway so located was to be constructed.

Appeal dismissed with costs.

*D'Arcy Tate and W. L. Scott*, for appellants. *Chrysler*, K.C., for respondent. *Sinclair*, K.C., and *G. F. Henderson*, K.C., for landowners.

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Ont.]                    **FRALICK v. GRAND TRUNK RY. CO.**                    [June 15.

*Railway—Accident—Negligence—Railway rules—Special instructions—Defective system—Common law negligence—Workmen's Compensation Act.*

Rule 2 of the rules of the Grand Trunk Ry. Co. provides that "In addition to these rules, the time-tables will contain special instructions, as the same may be found necessary. Special instructions, not in conflict with these rules, which may be given by proper authority, whether upon the time-tables or otherwise, shall be fully observed while in force."

Trains running out of Brantford, Ont., are under control of the train-despatcher at London. The railway time-table has for many years contained the following foot-note:

"Tillsonburg Branch. Yard engines at Brantford are allowed to push freight trains up the Mount Vernon grade and return to Brantford B. & T. Station without special orders from the train-despatcher. Yard-foreman in charge of yard-engine will be held responsible for protecting the return of the yard-engine, and for knowing such engine has returned before allow-

ing a train or engine to follow." By rule 224 "all messages or orders respecting the movement of trains . . . must be in writing."

*Held*, DAVIES and DUFF, JJ., dissenting, that assuming the foot-note on the time-table to be a "special instruction" under rule 2, it is inconsistent with the train-despatching system in force at Brantford and if, as the evidence indicated, engines were sent out under verbal orders to push freight trains up the grade it is also inconsistent with rule 224. Such instruction has, therefore, no legal operation.

2. Per GIROUARD and ANGLIN, JJ., that it was not a "special instruction" but a regulation and not having been sanctioned by order in council operation under it was illegal.

3. By the Railway Act a "train" includes any engine or locomotive. Rule 198 provides that it "includes an engine in service with or without cars equipped with signals."

4. Per GIROUARD, IDINGTON and ANGLIN, JJ., DUFF, J., contra, that an engine returning to the yard after pushing a train up the grade, though not equipped with signals is a "train" subject to the provisions of rule 224.

The accident in this case occurred through the yard-foreman failing to protect the engine on its return to the yard.

*Held*, DAVIES and DUFF, JJ., dissenting, that the company operated the yard-engines under an illegal system and were liable to common law damages.

Per DUFF, J., that the train-despatching system in general use was safer than that authorized by the time-table and the company by using the less safe system were liable at common law.

Appeal allowed with costs.

*Gibbons*, K.C., and *G.S. Gibbons*, for appellant. *D. L. McCarthy*, K.C., for respondents.

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Man.] CANADIAN NORTHERN RY. CO. v. ROBINSON. [June 15.

*Denial of traffic facilities—Damages—Injury by reason of operation of railway—Limitation of actions—Construction of statute.*

Injuries suffered through the refusal by a railway company to furnish reasonable and proper facilities for receiving, forwarding and delivering freight, as required by the Railway Act, to and from a shipper's warehouse, by means of a private spur-

track connecting with the railway, do not fall within the classes of injuries described as resulting from the construction or operation of the railway, in s. 242 of the Railway Act, 3 Edw. VII. c. 58, and, consequently, an action to recover damages therefor is not barred by the limitation prescribed for the commencement of actions and suits for indemnity prescribed by that section.

Judgment appealed from affirmed, GIROUARD and DAVIES, JJ., dissenting.

*Chrysler, K.C., and G. F. Macdonell, for appellants. Nesbitt, K.C., and Hudson, for respondents.*

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N.S.]

MUSGRAVE v. ANGLE.

[June 15.

*Evidence—Will—Evidence Act—Secondary evidence—Ejectment—Mesne profits.*

Sec. 27 of the Evidence Act of Nova Scotia, N.S.N.S. (1900), c. 163, provides that "A copy of the notarial Act or instrument in writing made in Quebec before a notary public, filled, enrolled or enregistered by such notary and certified by a notary or prothonotary to be a true copy of the original, thereby certified to be in his possession as such notary or prothonotary, shall be received in evidence in any court in place of the original, and shall have the same force and effect as the original would have if produced and proved." And by the first two sub-sections of s. 22 it is provided that:

"The probate of a will or a copy thereof certified under the hand of the registrar of probate or found to be a true copy of the original will, when such will has been recorded, shall be received as evidence of the original will, but the court may, upon due cause shewn upon affidavit, order the original will to be produced in evidence, or may direct such other proof of the original will as under the circumstances appears necessary or reasonable for testing the authenticity of the alleged original will, and its unaltered condition and the correctness of the prepared copy."

(2) "This section shall apply to wills and the probate and copies of wills proved elsewhere than in this province, provided that the original wills have been deposited and the probate and copies granted in courts having jurisdiction over the proof of wills and administration of intestate estates, or the custody of wills."

*Held, that a copy of a will executed before two notaries in*

the Province of Quebec under the provisions of art. 843 C.C. certified by one of said notaries to be a true copy of the original in his possession, is admissible in evidence on the trial of an action of ejectment in Nova Scotia, as provided in s. 27.

In an action of ejectment the plaintiff cannot recover mesne profits which accrued while the title was in his predecessor; and the defendant in possession by consent of the owner is not entitled to be paid for improvements or repaid disbursements made before the plaintiff obtained title.

Appeal dismissed with costs.

*O'Connor, K.C., and Gunn.* for appellants. *Finlay McDonald,* for respondent.

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## Province of Ontario.

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### COURT OF APPEAL.

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Moss, C.J., Osler, Garrow, Maclaren, JJ.A.]

[June 15.

*ALLEN v. CANADIAN PACIFIC RY. CO.*

*Railway—Carriage of goods—Destruction—Liability—Tort—Special contract between express company and shipper—Exemption—Application for benefit of railway company—Contract between express company and railway company.*

Appeal by the defendants from the judgment of RIDDELL, J., 19 O.L.R. 510, in favour of the plaintiff, in an action to recover the value of goods, destroyed in the course of carriage.

The plaintiff, desiring to send a trunk of valuable samples from Toronto to Quebec, sent it in the usual way to the Dominion Express Co. by one of their carters. The plaintiff failed to place a value upon the articles contained in the trunk, with the result that such value, under the terms of the receipt, was fixed as between him and the express company at \$50. The express company are an independent company operating upon the lines of railway of the defendants in Canada, under a general agreement with the defendants containing a provision by which the express company assume all responsibility for and agree to satisfy all valid claims for the loss of or damage to express matter in their charge, and to hold the defendants harmless and indemnified against the claims. The goods were placed by the express com-

pany in the car used for that purpose upon the defendants' railway, and there remained in the charge of the express messenger, where they were when a collision occurred between the train on which they were and another train of the defendants, as a result of which a fire took place and the goods were destroyed. The defendants admitted that the collision was caused by the negligence of their servants; and for the damages thus caused this action is brought.

GARROW, J.A.:—The cause of action is one arising, if at all, ex delicto, because the plaintiff had no contract with the defendants. And it is not the ordinary cause of action against a common carrier for not carrying safely—which may be in tort as well as upon the contract—because the goods were not received by the defendants in that character, but under their general agreement with the express company, which contains the exemption from liability clause to which I have referred. That such an action will lie seems beyond question. Here, if the loss had occurred through any negligence on the part of the express company or their servants, the defendants would not have been liable. What they are, in my opinion, liable for is their own separate, or, as it is in some of the cases called, “active,” negligence in bringing about the collision.

The only real defence to the plaintiff's claim is made upon two grounds: (1) that the defendants are entitled as against the plaintiff to the exemption from liability stipulated for in their agreement with the express company under which they received and were carrying the goods; and (2) that in any event they are entitled to the benefit of the limitation of liability to \$50 provided for in the plaintiff's contract with the express company, which amount the defendants paid into Court without admitting liability.

There is, however, in my opinion, this fatal objection to the success of both defences that to the first agreement the plaintiff is a stranger, and to the second the defendants are in the same position. In addition the exemptions claimed would not extend to include an act of collateral or “active” negligence . . . such as the collision. Such indemnity or exemption clauses are, quite properly, construed strictly, and, if intended to exclude claims for negligence, that should be clearly expressed. See *Price v. Union Lighterage Co.*, 20 Times L.R. 177. . . . But, if the agreement between the plaintiff and the express company has any application, I agree with the construction placed by RIDDELL, J., upon the obscurely expressed clause relied on, “that the

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stipulation contained herein shall extend to and inure to the benefit of each and every company or person to whom through this company the below described property may be intrusted or delivered for transportation," namely, that it was not intended to apply and does not apply to the defendants, but to a company or person beyond the line of the defendants' railway, over the whole of whose lines in Canada the express company operate, to which company or person it might be necessary for the express company to part with the property in order that it might reach its destination.

Appeal dismissed with costs.

*W. Nesbitt, K.C., and MacMurphy, for defendants. Shepley, K.C., and Mason, for plaintiffs.*

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Full Court.]            *REX v. VENTRICINI.*            [June 20.

*Criminal law—Murder—Judge's right to comment on evidence.*

The prisoner was tried before RIDDELL, J., for murder and was found guilty with a strong recommendation to mercy. The case was reserved for the opinion of the Court of Appeal touching the right of a judge to discuss and advise on the evidence.

*Held*, that the judge is under no obligation to refrain from commenting upon the evidence. He is not a mere automaton, but is at liberty to state his own impressions of the evidence, provided he is careful to make the jury understand that in the matter of deciding upon the evidence and finding what they deem to be the facts, that they are to be the sole judges; and, in this case, the judge emphatically impressed this upon the jury, and there was no reason to suppose that there was any misapprehension on their part as to their functions or duties.

*Robinette, K.C., for prisoner. Cartwright, K.C., for the Crown.*

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Full Court.]            *REX v. SMITH AND LUTHER.*            [June 20.

*Criminal law—Usury—Conviction—Money Lenders Act—Evidence—Evasion of statute—Leave to appeal refused.*

The defendants were tried before DENTON, Co.J., under the provisions of the Criminal Code for the speedy trials of indictable offences, upon a charge of lending money at a greater rate of interest than that authorized by the Money Lenders Act, R.S.C.

1906, c. 122, and were convicted. Counsel for the defendants applied to the Judge to reserve a case for the opinion of this court, and, upon his refusal, applied to this court for leave to appeal.

Moss, C.J.O.:—The questions of law sought to be raised for the opinion of the court are, whether certain evidence admitted by the learned judge was properly receivable in evidence against the defendants, and whether, in any event, there was evidence upon which the learned judge could properly convict. For the purposes of this application it is not necessary to determine whether all the evidence objected to was or was not properly receivable. There was no jury, and the case really resolved itself into a question whether there is evidence properly receivable upon which the learned judge could find the defendants guilty of the offence charged.

Having examined the evidence and proceedings, we do not think there is any reasonable ground for calling for a stated case. The matter to be decided by the learned judge was one of fact, whether the defendants were, notwithstanding the methods adopted and the forms practised, engaged in money-lending in contravention of the Money Lenders Act, or were aiders or abettors of persons engaged in such illegal money-lending, and so guilty as principals under s. 69 of the Criminal Code. It appears to us that there was evidence to which no objection could be taken to justify the learned judge's conclusion. The methods adopted and the forms practised by which an incorporated company is made to appear to act as agent for the borrower for a liberal commission, the amount of which is first added to the loan and then deducted from the whole sum advanced, and for which security is taken, the company being represented in the procuring of the loan by the same person who at the same time is acting under a power of attorney from an individual personally unknown to the attorney, but whose money the attorney says he advances to the borrower, or the professed ignorance of the defendants of the nature of these dealings, cannot cloak the real transaction or the obvious design of exacting from the borrower a rate of interest upon the advance greatly exceeding that authorized by the Act.

Application refused.

*J. W. Curry*, K.C., for the defendant Smith. *J. R. Roaf*, for the defendant Luther. *J. R. Cartwright*, K.C., and *E. Bayly*, K.C., for the Crown.

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Moss, C.J., Garrow, Maclarens and Meredith, J.J.A.] [June 20.

NEWTON v. CITY OF BRANTFORD.

*Negligence—Unguarded hole in floor of building—Duty of owners to person invited on premises—Knowledge of danger—Evidence—Nonsuit.*

Appeal by the defendants from the order of a Divisional Court, setting aside the judgment of LATCHFORD, J., who dismissed the action at the trial, and directing a new trial. The action was brought to recover damages for injuries sustained by the plaintiff through the alleged negligence of the defendants in leaving unguarded an opening in the floor of a fire hall, used by the firemen to reach the lower floor, into which hole the plaintiff fell and was injured. The plaintiff was in the employment of one Cave, who had contracted with the defendants to paint the fire hall. On the 15th May, 1909, the plaintiff was at work painting on the second floor, and to reach a part of his work was using a stepladder which he placed near the opening, and in coming down from the ladder he inadvertently stepped into the opening and fell to the floor below, a distance of about 16 feet. The trial judge had held that no evidence had been given from which an inference of negligence could be drawn. He also was of the opinion that in any event the plaintiff had, upon the uncontradicted evidence, been guilty of contributory negligence, and accordingly dismissed the action.

The Divisional Court considered that there was some evidence of negligence on the part of the defendants in the failure properly to guard the opening, and it was for the jury to say whether the plaintiff had voluntarily assumed the risk; and a new trial was directed.

GARROW, J.A.:—The measure of duty imposed by law in such a case has, I think, been clearly defined . . . A leading case appears still to be *Indermaur v. Dames*, L.R. 1 C.P. 274, L.R. 2 C.P. 311, in which the position of such an one as the plaintiff is defined to be that of a person invited upon the premises by the owner for the transaction of business in which both are interested. And the duty owing in such a case is there said to be to take reasonable means to guard the invitee from dangers which are not visible and of which he does not know. But the plaintiff here knew all about the opening. In the course of his examination he was asked these questions: “Q. Had you known about this hole from the time you went to work, nine days before the accident? A. Yes, sir. Q. Knew what it was used for? A. Yes,

sir. Q. Knew its danger when you were up-stairs? A. Yes, sir, but really could not realize that I was to be called on to be so close." No one told him how or where to place the stepladder. That was entirely his own doing, just as stepping into the opening was his own mistake.

I therefore agree with LATCHFORD, J., that there was no evidence of negligence on the part of the defendants, and that the appeal should be allowed and the action dismissed, both with costs if demanded.

W. T. Henderson, for the defendants. W. S. Brewster, K.C., for the plaintiff.

#### HIGH COURT OF JUSTICE.

Riddell, J.]                    JOHNSON *v.* BIRKETT.                    [June 10.

*Evidence—Examination of plaintiff for discovery—Death of plaintiff—Continuation of action by executor—Tender of depositions of deceased as evidence on behalf of executor—Principal and agent—Moneys intrusted to agent for purchase of stock—Purchase of stock by agent on his own behalf—Intention to appropriate part to principal—Absence of evidence of good faith and information given to principal—Scale of costs—10 Edw. VII. c. 30(O.).*

This action was brought in September, 1908, for the return of \$500 alleged to have been paid by her to the defendant in 1906. After the pleadings had been delivered, i.e., in February, 1909, she was examined for discovery. She died in December, 1909, and her executor obtained an order to continue the action in his name. The action was tried before RIDDELL, J., without a jury.

The plaintiff offered as evidence the examination for discovery of the deceased Mrs. Johnson. The defendant objecting, the trial judge allowed the examination to be marked for identification only, and the trial proceeded. The plaintiff then read certain parts of the examination for discovery of the defendant, and rested his case. The defendant called no evidence.

RIDDELL, J.:—It becomes necessary to consider whether, in the circumstances, the plaintiff can be allowed to make use of the examination for discovery of the original plaintiff, his testatrix. . . .

It was said in *Drewitt v. Drewitt*, 58 L.T.R. 684, that a motion under the English rule corresponding to Con. Rule 483

should be made before trial, but the judge there, said he would treat the application at the trial as having been made before the trial—and I shall pursue the same course in the present instance, and treat the application by the plaintiff to read the examination for discovery of Mrs. Johnson as an application regularly made for that purpose before trial. There is nothing in principle or in authority to justify my admission of this examination to prove the case of the plaintiff here; and I accordingly reject it. My reasons briefly are: (1) the evidence could not be used at any stage of the action against the defendant upon any proceeding in the lifetime of the witness; (2) an examination for discovery is not an affidavit, so that Con. Rule 483 can apply; and (3) the rules provide for the use to be made of the examination for another—and *expratio unius est exclusio alterius*.

Turning now to the admissible evidence. The statement of defence puts everything in issue except that the defendant, on or about the 24th August, 1906, "secured from the plaintiff instructions to purchase for her 500 shares of the capital stock of the Boston Mines Company, Limited, at or for the price or sum of \$1 per share. The examination for discovery of the defendant sets out that he received a cheque for \$500 from the plaintiff about the 24th August, 1906, which he cashed; that he had an agreement with the company for some shares, but they are still "pooled" and so not issued; that Mrs. Johnson bought some of his 2,000 shares in August, 1906, and by August, 1906, he had been paid by her for them. No shares have been issued yet to her, because her solicitor didn't want it. He used the \$500 received as his own, and did not pay it to anybody as the price of shares in the company; he never offered her certificates for any shares; he never had them to offer; the only thing he had was his agreement; on the 27th July, 1908, he received a letter from the solicitor of the plaintiff that his authority to buy shares was revoked, and requiring him to return the \$500, which he refused to do.

Taking the admissions in the pleading and the examination together, it sufficiently appears that the defendant, having instructions from the plaintiff to buy for her 500 shares of the capital stock of the company, and having received \$500 from her for that purpose, did not buy for her 500 shares at all, but bought for himself 2,000 shares of pooled stock, out of which he intended to give her 500 shares (as being bought from himself) when the stock should be issued—and that, the defendant not having carried out his instructions exactly, his authority was revoked, and the money demanded back. . . .

It may well be that, had the defendant seen fit to give evidence, he might have shewn not only perfect good faith on his part, but also full information given, but he has not done so. He makes the statement in a letter, but does not swear to it.

The plaintiff is entitled to judgment.

*W. C. Mackay*, for the plaintiff. *J. C. Sherry*, for the defendant.

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Britton, J., Clute, J., Middleton, J.]

[June 11.

RE GILES AND TOWN OF ALMONTE.

*Municipal corporations—Local option by-law—Voting—Form of ballot—Departure from statute—Interpretation Act, s. 7 (35).*

Appeal from order of *MEREDITH*, C.J.C.P., dismissing without costs a motion to quash a local option by-law.

The sole question argued was as to the sufficiency of the form of the ballot used at the voting. The form used was that existing prior to the amending Act of 1908, where the words in the respective columns are "for the by-law," "against the by-law."

*Held*, the statute 8 Edw. VII. c. 54, s. 10, amends the Liquor License Act, s. 141, and provides that the form of the ballot paper to be used for voting on a by-law under that section shall be as follows: "For local option"—"Against local option." The defect in form, if any, is cured by the Interpretation Act, 7 Edw. VII. c. 2, s. 7(35), which reads: "Where forms are prescribed, deviations therefrom not affecting the substance or calculated to mislead, shall not vitiate them." Although the words used were "for the by-law," instead of "for local option," they are the same in substance; nor was the change calculated to mislead any voter.

Appeal dismissed with costs.

*Haverson*, K.C., for the appellant. *Raney*, K.C., for the town corporation.

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Divisional Court, C.P.]

[June 29.

WAGNER v. CROFT.

*Meaning of the word "about."*

The word "about" is a relative and ambiguous term, the meaning of which is affected by circumstances, and evidence may

be received to shew the intention of the parties in the light of surrounding circumstances. See *Harten v. Loeffler*, 212 U.S. 397. The correspondence in this case supply the necessary explanation.

*T. P. Galt*, K.C., for plaintiff. *A. McLean Macdonell*, for defendant.

Meredith, C.J.C.P.]

[June 20.

CANADIAN RAILWAY ACCIDENT CO. v. WILLIAMS.

*Execution—Interest in oil lands—Goods or lands—Incorporeal hereditaments.*

Motion by defendant to restrain plaintiff and the sheriff from selling under the plaintiff's execution their interest in certain oil leases which were made by the owners of certain lands to one Egan who had executed a declaration that he held certain undivided interest in them in trust for the defendant.

*Held*, that these oil leases were substantially in the same form as the instrument the effect of which was considered in *McIntosh v. Leckie*, 14 O.L.R. 54, and were not saleable as goods under the execution. See *Duke of Sutherland v. Heathcote* (1892), 1 Ch. 475, 483; *Wickham v. Hunter*, 7 M. & W. 62, 78; *Gowan v. Christie*, L.R. 2 Sc. App. 273; *Coltness Iron Co. v. Black*, 6 App. Cas. 315.

*H. S. White*, for applicants. *J. M. Ferguson*, for the plaintiff and the sheriff.

Boyd, C.]

RE STOKES.

[June 17.

*Will—Construction—Devise of dwelling—Addition of buildings after date of will.*

The testator devised to his adopted daughter "the dwelling on the south side of Banfield Street in which we now reside in the town of Paris."

At the date of the will, October, 1907, the testator and his wife lived in this house. He died in December, 1909, and in the interval, had added two rooms to the original house and removed a barn which was on the rear of the lot in front and improved it into another habitable house. It was contended that there was an intestacy as to the improved part of the lot.

*Held*, that the above structural changes did not change the area of the benefit intended by the testator in the property described and identified in the will. There was therefore no intes-

tacy and the devisee took the whole premises. See *In re Alexander* (1910), W.N. 36; *In re Champion* (1893), 1 Ch. 101; *St. Thomas Hospital v. Charing Cross R.W. Co.*, 1 J. & H. 404.

Wm. Charlton, Grayson Smith, and J. E. Jones, for the various parties.

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Riddell, J.]

PRICE v. PRICE.

[June 16.

*Husband and wife—Alimony—Wife living in husband's house, he supplying her food but not with clothing.*

Action for alimony. The wife was living under her husband's roof though not occupying the same bed and did not desire the resumption of marital intercourse. He supplied her with food, but not with clothing, and notified the storekeepers not to supply her with clothing at his expense.

Held, that under the circumstances there could be no alimony, the right to which is found in Ont. Jud. Act, s. 34. As long as the wife remains in her husband's house, the law only enables her to enforce the marital obligations to supply her with clothing by a circuitous route, viz., by pledging the credit of her husband for necessaries. See *Debenham v. Melton*, 5 Q.B.D. 394, 398.

G. F. Mahon, for plaintiff. H. W. Mitchell, for defendant.

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#### OFFICIAL REFEREES.

Kappelle, O.R.]

[June 11.

RE STANDARD MUTUAL FIRE INCE. CO.  
MUSSON'S CASE.

*Company—Winding-up—Contributory—Shares held by agent or trustee—Liability.*

This was an application to place the name of T. C. Musson on the list of contributories in respect of the amount unpaid on 20 shares of stock standing in his name in trust for the Union Fire Agency, Limited. The referee found that Musson was the nominee of the United Fire Agencies, Limited, holding shares for them in trust. It was urged that Musson was simply the agent for a disclosed principal, and that the principal should be placed on the list of contributories and not the agent. See Winding-up Act, s. 51, and Ont. Ins. Act, R.S.O. (1897), c. 203, and Ont. Companies Act, ss. 66, 71, 72.

*Held*, that where, as in this case, A. holds shares in trust for B., in the absence of any statutory provision to the contrary, even although B. is named, A. must be put on the list of contributories as the shareholder liable. B. is not the shareholder, A. is. The case is governed by Ont. Ins. Act, R.S.O. 1897, c. 203, s. 21. The sole question is who is the legal owner of the shares, and Musson, in this case, is the owner and the shareholder in respect of these shares, and is therefore liable to contribute the amount unpaid thereon.

*E. P. Brown*, for liquidator. *Shirley Denison*, for Musson.

## Province of Nova Scotia.

### SUPREME COURT.

Meagher, J.] JOHNSTON v. ROBERTSON. [June 24.

*Reply and defence to counterclaim out of time—Motion to dismiss action for want of prosecution and assess damages on counterclaim—Terms.*

Motion to dismiss the action for want of prosecution and to assess damages on the counterclaim. The statement of claim delivered Aug. 20th, 1909, was for damages for the illegal issue of a warrant for the plaintiff's arrest and under which he was arrested and imprisoned all at the defendant's instance. The counterclaim for an aggravated assault by the plaintiff upon the defendant for which he had been convicted and suffered imprisonment, delivered with the defence, August 28th, 1909. The reply and defence to the counterclaim of denial and self-defence pleaded June 7th, 1910. A notice of motion dated June 7th, 1910, was served June 9th, 1910, for an order to dismiss the action for want of prosecution and for an assessment of damages on the counterclaim.

*Held*, that the reply and defence to the counterclaim although pleaded out of time and without formal leave cannot be disregarded and while it remains upon the record damages cannot be assessed upon the counterclaim and the motion must be dismissed on the terms that the parties must go to trial at a special term on July 18th, 1910, on the action and counterclaim, all costs of the motion being reserved. *Giggings v. Strong*, 26 C.D. 66, and *Gilder v. Morrison*, 30 W.R. 815 referred to.

*H. S. McKay*, for the motion. *J. J. Power*, K.C., contra.

Graham, E.J., Trial.]

[July 12.

KAULBACH v. MORASH.

*Vendor and purchaser—Unpaid purchase money—Lien for enforcement of Statute of Limitations—Interest.*

The main defence to an action to enforce a vendor's lien for unpaid purchase money was that the claim was barred by the Statute of Limitations, but it appeared from letters written by defendant that within the period of twenty years he had acknowledged plaintiff's right to the purchase money, and to have the property to satisfy it, and further, that ever since a payment made on account, more than twenty years before action brought, the defendant had been in a foreign country out of the jurisdiction of the court.

*Held,* 1. That plaintiff was entitled to a lien on the land for the amount of his claim.

2. That he was entitled to recover interest on the amount at the rate of six per cent. to date of the writ and interest at the same rate after that date until payment of the amount claimed.

3. That plaintiff was entitled to an order for sale of the land as in case of foreclosure and sale, unless before the day of sale the amount due was paid.

*Pakin, K.C., for plaintiff. Chesley, K.C., and Lane, for defendant.*

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Graham, E.J.]

[July 12.

EQUITY LODGE NO. 11, PROVINCIAL WORKMEN'S ASSOCIATION  
*v. McDonald.*

*Beneficial association—Dissolution—Distribution of funds.*

Plaintiff was a subordinate lodge of an association known as the Provincial Workmen's Association, the general affairs of the association being managed by a body known as the Grand Council, which was supported by fees received from the various lodges and had power to enforce special levies for funds and made grants of funds to lodges in cases of strikes or other necessity. The various lodges composing the association were incorporated and the Grand Council was also incorporated and upon the dissolution of subordinate lodges the property of such lodges was forthwith vested in the Grand Council, to be applied for purposes specified in the act incorporating the latter body. A majority of the members of plaintiff lodge desired to surrender the charter of the lodge and dissolve the lodge and distribute

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its property, real and personal, among the members preliminary to connecting themselves with another organization known as the United Mine Workers of America, and introduced and carried resolutions to that effect. This was opposed by the minority who applied for and obtained an interim restraining order.

*Held.* 1. Making the order perpetual, that the majority could not dissolve the lodge under the circumstances and with the object in view, and that the minority, remaining in allegiance to the association had the right to apply to restrain the proposed diversion of funds, and that for such purpose they had the right to make use of the corporate name.

2. The fact that under their Act of incorporation the members had the right to dispose of the property of the lodge "for the benefit of the lodge" did not give the majority the right to dissolve and divert the funds in the manner proposed.

3. The Grand Council, having an interest in the funds of the lodge, was properly made a party to the proceedings.

*D. A. Cameron*, for plaintiff. *J. M. Cameron* and *Harrington*, for defendants.

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Graham, E.J.]                    DEVENNE v. WARREN.                    [July 12.

*Specific performance—Injunction by foreign court—No answer to claim—Pleas—Striking out.*

It is no answer to an action claiming the specific performance of an agreement for the sale of land that one of the vendors, after the making of the contract, has been enjoined by a court of a foreign country pending the determination of a suit in such court, from transferring property of any kind and wheresoever situate.

Such a defence will be struck out on application for that purpose, as disclosing no reasonable defence to the action.

*Sterne*, for plaintiff. *Casey*, for defendant.

## Province of Manitoba.

### KING'S BENCH.

Mathers, C.J.]

[May 25.

IN RE RURAL MUNICIPALITY OF OAKLAND.

*Local option by-law—Form of ballot—Meaning of words “as soon as possible”—Failure to keep polls open during prescribed hours.*

1. The use of the form of ballot prescribed by s. 4a of c. 31 of 9 Edw. VII., amending s. 68 of the Liquor License Act, R.S.M. 1902, c. 101, at the voting on a local option by-law together with the directions for the guidance of voters in the form prescribed by s. 391 and sch. F. of the Municipal Act, R.S.M. 1902, c. 116, is not a fatal objection to the by-law, notwithstanding the inconsistency of the two forms.

2. The first publication of the notice of the voting on a local option by-law required by s. 66 of the Liquor License Act having been on Oct. 14, this was not “as soon as possible” after the second reading, which had taken place on the preceding June 5, and the by-law, although carried, should be quashed because that section had not been complied with.

3. The deliberate closing of one of the polls for about an hour upon an adjournment for lunch, though with the consent of all present and in pursuance of a local custom, was held fatal to the by-law in the absence of positive evidence that the result of the voting had not been affected thereby. *Scott v. Imperial Loan Co.*, 11 M.R. 190, followed.

4. A local option by-law may be given its third reading without waiting for the time for applying for a recount to elapse. *Re Coxworth and Hensall*, 17 O.L.R. 431, followed.

*Andrews*, K.C., and *F. M. Burbidge*, for applicant. *Matheson*, for municipality.

Prendergast, J.]

SMITH v. MURRAY.

[June 11.

*Practice—Demurrer—Motion to strike out parts of statement of claim as embarrassing.*

After a defendant, in his statement of defence, has demurred to certain paragraphs of the statement of claim as disclosing no facts upon which the plaintiff would be entitled to recover,

a motion to strike out the same paragraphs as embarrassing and prejudicial to the fair trial of the action on the same grounds should not be entertained while such demurrer is pending.

*Hagel, K.C., for plaintiff. Cohen, for defendants.*

**Mathers, C.J.] SCHRAGGE v. WEIDMAN.** [June 22.

*Conspiracy in restraint of trade—Criminal combination—Illegal contract—Crim. Code, s. 498 (b), (d).*

Two junk dealers, who controlled practically the whole trade in junk in Western Canada, entered into an agreement to fix prices for buying and selling for one year, the effect of which was to do away with all competition between themselves. The evidence shewed that their intention was to destroy all other competition, and control the market for themselves.

*Held*, 1. Following *Mogul Steamship Co. v. McGregor* (1892), A.C. 25, and *Collins v. Lock*, 4 A.C. 674, that such agreement was not void at common law as being in restraint of trade. *Urmston v. Whitelegg*, 63 L.T.N.S. 455, distinguished.

2. Following *Rex v. Gage*, 18 Man. 175, that the agreement was not a contravention of sub-s. (b) of s. 498 of the Criminal Code against undue restraints of trade.

3. But, following *Rex v. Clarke*, 14 C.C.C. 46; *Wampole v. Karn*, 11 O.L.R. 619, and *Rex v. Elliott*, 9 O.L.R. 648, the agreement was in direct violation of sub-s. (d) of s. 498, as unduly preventing competition, and therefore one which could not be enforced by action between the parties.

*MacNeil and Deacon, for plaintiff. F. M. Burbidge, for defendants.*

## Province of Quebec.

### POLICE COURT—MONTREAL.

**Judge Bazin, Pol. Mag.]**

[May 2.

**THE KING v. LYONS.**

*Attempt to obtain money by false pretences—Advertisement of trade mark preparation—Passing off a substitute article with similar name—Cut-rate druggist—Sale of Pepto-mangan solution—Knowledge by vendee of attempted deception—Transaction completed—No conviction for obtaining money by false pretences—Conviction for attempt although vendee not deceived—Cr. Code secs. 72, 404, 405, 949, 951.*

1. A storekeeper who advertises to sell a drug preparation under the registered trade mark name by which it is commonly known with the intention of passing off, to persons calling for the advertised goods, his own similar preparation which he had labelled so as not to infringe the trade mark, may be convicted of an attempt to obtain money by false pretences on proof that he took the advertised price and delivered his own preparation in carrying out the fraudulent intent, although a conviction for obtaining money by false pretences could not be had as the purchasers in the particular case being conversant with the drug trade knew they were not getting the trade mark goods and were not deceived.

2. Where the purchase is made and the money parted with from a desire to secure the conviction of the seller there is no obtaining by false pretences, but the seller may yet be liable for the attempt.

3. *Semblé*, it is not necessary for the prosecution to shew that the commodity passed off is inferior in quality to the trade mark article, or that it is less in quantity; and the accused may be convicted, although it appears that the ingredients are nearly identical.

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### Book Reviews.

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*The law of meetings.* A concise statement of the law relating to the conduct and control of meetings in general. 5th edition. By C. P. BLACKWELL, B.A. London: Butterworth & Co., Bell Yard, Temple Bar, Law Publishers. 1910.

An excellent and handy compendium. The general propositions will be just as useful here as in England; but most of it refers to meetings under statutory provisions not in force here.

*Students' Cases, illustrative of all branches of the law.* By PHILLIP PETRIDES, Barrister-at-law. London: Stevens & Sons, Chancery Lane, Law Publishers. 1910.

Of the making of books there is no end, and students in these happy days have manuals without number. The author makes a new departure by giving some leading cases selected for students, appending thereto dissertations on various matters, which appear to be germane to the principle of the leading case itself.

- Whether this book will be found helpful and so command an extensive sale by reason of the novelty of the scheme we do not pretend to prophecy, but the author seems to have done his part of the work well.

*Hayes and Jarman's concise forms of will with practical notes.*

13th edition. By J. H. MATTHEWS, Barrister-at-law. London : Sweet & Maxwell, Limited.

There is not much that need be said about a book which has arrived at the mature age of a 13th edition, and which as a standard work has enjoyed the confidence of the profession since 1835. It is as well known to them as it is to the reviewer. In the present edition references have been added to the Revised Reports and references have also been made in the notes of cases reported down to the end of the year 1909.

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### **Flotsam and Jetsam.**

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A certain Philadelphia judge, who, disgusted with a jury that seemed unable to reach an agreement in a perfectly evident case, rose and said, "I discharge this jury."

One sensitive talesman, indignant at what he considered a rebuke, obstinately faced the judge.

"You can't discharge me," he said, in tones of one standing upon his rights.

"And why not?" asked the surprised judge.

"Because," answered the juror, pointing to the lawyer for the defence, "I'm being hired by that man there."

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## LICENSING EXTRA-PROVINCIAL COMPANIES.

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Considerable discussion has been evoked in the public press by the provisions of the new Companies Act of British Columbia requiring extra-provincial companies to become licensed or registered before doing business in the province. The Act has been attacked on the one hand as an obstruction to commerce, and defended on the other on the ground that other provinces, in particular Ontario, have similar Acts in force.

### I. ACTS IN ALL THE PROVINCES.

It is true that in most of the provinces of the Dominion there have been passed during recent years statutory enactments requiring companies not incorporated in the enacting province to become re-incorporated or to take out a license before carrying on business within the province. In the majority of the provinces these enactments are reproductions, with greater or less variation, of the Ontario "Act respecting the Licensing

of Extra-Provincial Corporations." This Act was passed in 1900. It was adopted by New Brunswick in 1903; and the same year enacted in the North-West Territories by an Ordinance which is still in force in Alberta and Saskatchewan. The Province of Quebec enacted similar provisions in 1904, and the Province of Manitoba adopted the Ontario Act in 1909. In March of the present year the British Columbia Companies Act was revised and some of the provisions relating to extra-provincial companies were re-cast in form similar to the Ontario Act. The law in Nova Scotia and Prince Edward Island has remained uninfluenced by the Ontario Act of 1900, though there are provisions in both provinces relating to business by foreign companies.

## II. OBJECTS OF THE ACT.

The objects of all these Acts is of course frankly fiscal, though a number of them include provisions intended to afford facilities for a proper representation of the companies in legal proceedings. The genesis of the Ontario Act may be found in the tendency of intending incorporators, during the last number of years, to go to Ottawa for their charters, instead of to the provincial department. License fees were imposed upon Dominion companies on the basis of the amount of capital employed in the province. The effect of this has been to place Dominion charters under the ban, as it were, of a double fee, and encouraging the incorporation of companies, where possible, by provincial authority. The result of the legislation is apparent in the fact that in Ontario a large majority of commercial and industrial companies operate under Ontario charters, while in Quebec where Dominion companies require no license the proportions are reversed and the majority of such companies are chartered by the Dominion department.

## III. CONSTITUTIONAL QUESTIONS.

The boundary between the constitutional powers of the provinces and the Dominion over the incorporation of commercial

and industrial corporations is as yet very vaguely defined, but a number of recent cases<sup>1</sup> have brought the matter into prominence with the result that a stated case has been prepared and submitted by Order-in-Council to the Supreme Court.<sup>2</sup> This stated case consists of a series of questions involving the whole subject of company incorporation in its constitutional aspect, and presents perhaps the most important issue that has ever been brought before the Supreme Court in a single case.

The magnitude of the questions involved in this case can scarcely be over-estimated, and whatever the decision, it will almost certainly be appealed to the Privy Council, and will in all probability result in an application to amend the British North America Act. Item 11 of s. 92 of the Act gives the provinces jurisdiction over "the incorporation of companies with provincial objects." The incorporation of banks is specifically relegated to the Dominion Government; but, as the Dominion possesses the residuum of powers not granted to the provinces, the incorporation of companies with other than provincial objects is vested in the Dominion. The whole controversy, therefore, centers around the meaning of the words "provincial objects."

The right of the provinces to impose license fees upon extra-provincial companies is generally supported as based upon the jurisdiction of the provinces over "direct taxation within the province in order to the raising of a revenue for provincial purposes"; and in a number of decisions in the provincial courts<sup>3</sup> Acts imposing such fees have been upheld on this ground.

1. See *C.P.R. v. Ottawa Fire Ins. Co.*, 39 S.C.R. 405; *Re York Loan & Savings Co.*, 11 O.W.R. 507.

2. The text of the case is published on succeeding pages.

3. *Halifax v. Western Assurance Co.* (1885), 18 N.S.L.R. 387; *Halifax v. Jones*, 28 N.S.L.R. 452; *Waterous Engine Works Co. v. Okanagan Lumber Co.* (1908), 14 B.C.R. 238; *Rex v. Massey-Harris Co.*, 9 Can. Cr. Cas. 25; *International Text Book Co. v. Brown*, 13 O.L.R. 644.

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**IV. COMPARISON OF LEGISLATION IN THE PROVINCES.**

To a proper understanding of the nature and effect of the legislation in the various provinces a brief analysis of their provisions is necessary:—

1. *The Ontario Act.*—The Ontario Act<sup>4</sup> requires all companies not incorporated under the laws of the province to take out a "license" before "carrying on business" within the province. Companies not complying with the provisions of the Act are liable to penalties and are incapable of "maintaining any action, suit or other proceeding in any court in Ontario in respect of any contract" in connection with business carried on contrary to the Act. The fees payable for a license are fixed by Order-in-Council. In these fees the department distinguishes between companies incorporated under Dominion laws and those incorporated in the other provinces. Dominion companies pay twenty-five or fifty dollars according as their nominal capital is within \$100,000 or exceeds that amount. Companies of the other provinces pay a fee based upon the amount of capital employed in business in Ontario, the fee being calculated on the schedule of fees for incorporation of companies in Ontario. In order to obtain its license the company must establish a head office in the province and appoint an attorney through whom all legal proceedings must be conducted.

2. *Similar Acts in other provinces.*—In New Brunswick the enactment took the form of an extension of the provisions of an Act "respecting the Imposition of Certain Taxes on Certain Incorporated Companies and Associations";<sup>5</sup> and the fee imposed is an annual one of either fifty or one hundred dollars according as the capital stock of the company is within \$100,000 or exceeds that amount. No distinction is made between Dominion and provincial companies. There is provision similar to that of the Ontario Act disabling companies within

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4. 63 Vict. c. 24.

5. 3 Edw. VII. c. 25, s. 1; Cons. Stats. New Brunswick, c. 18, ss. 7 et seq.

the Act from maintaining actions in the courts. Provision is also made for the appointment of a resident attorney to represent the company.

The Act of Manitoba<sup>6</sup> is modelled upon that of Ontario, having been re-cast in 1909. Before that time, however, an Act of 1883,<sup>7</sup> applicable to foreign loan companies extended in 1892<sup>8</sup> to foreign companies in general, required these companies to become licensed before doing business. A good deal of difficulty was experienced in enforcing the Act and it was of little effect. The present Act is similar in form and effect to the Ontario Act. In the schedule of fees issued under the Act, however, no distinction is made between Dominion and provincial companies, the fees being calculated upon the capital stock of the company. The sections imposing penalties and disabilities are identical with those of the Ontario Act. A power of attorney must be given to the "principal agent or manager of such company" authorizing him to accept service of process.

The "Foreign Companies Ordinance" of the North-West Territories<sup>9</sup> was similar in effect to the Ontario Act. The fees imposed were the same as those for incorporation of companies, ranging from \$15 upward. This is still the law in Saskatchewan. In Alberta, the Ordinance has been amended<sup>10</sup> and the fees are calculated upon the "capitalization" of the company, the minimum fee being \$75. There is also a curious provision in the Alberta amendment, applicable to certain classes of companies set out in a schedule to the Act, which makes such companies liable to an annual fee of fifty dollars unless they pay their regular license or registration fee. The effect of this appears to be to enable the companies affected to commute their annual tax of \$50, by a lump payment based upon the capital of the company. In both provinces a resident attorney must be

6. 9 Edw. VII. c. 10.

7. 46 and 47 Vict. c. 38.

8. 55 Vict. c. 4.

9. 3 Edw. VII. c. 14; amended 4 Edw. VII. c. 19.

10. 7 Edw. VII. c. 5; 8 Edw. VII. c. 20; 9 Edw. VII. c. 4.

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appointed as under the Ontario Act, but it is not necessary to establish a head office in the province.

In all these Acts an essential feature is the definition of the words "carrying on business."

The Acts of New Brunswick, Alberta, Saskatchewan and Manitoba all contain provisions similar to the following from the Ontario Act:

"Provided that taking orders for or buying or selling goods, wares and merchandise by travellers or by correspondence, if the corporation has no resident agent or representative or no office or place of business in Ontario, shall not be deemed a carrying on of business within the meaning of this Act."

It will be seen that this proviso controls the whole effect of the Act and renders it inapplicable unless the company in effect establishes a branch within the province. In this aspect the whole effect of the Act is to impose, by a roundabout method of drafting, a license fee upon companies becoming localized in the province. In New Brunswick, and in other provinces where the fee is an annual one, it may undoubtedly be regarded as a tax, and there are decisions upholding the single fees under the other Acts on the same ground.

3. *The Quebec Act.*—The Act of the Province of Quebec<sup>11</sup> is also modelled upon the general lines of the Ontario Act, but does not follow the latter as closely as do the Acts of New Brunswick, Alberta, Saskatchewan and Manitoba. The Quebec statute does not apply to companies incorporated in provinces where companies incorporated by the Legislature of Quebec are allowed to operate without a license. Nor does it apply to companies incorporated by the Dominion. The fee is payable only once and is based upon the capital stock of the company, the minimum being \$100. A penalty of \$100 is imposed for infractions of the Act. A head office must be named and an attorney

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11. R.S.Q., arts. 6098-6110.

appointed. But there is no disabling section like those of the Ontario and New Brunswick Acts.

The Act provides that "no company, firm, broker, agent or other person shall, as the representative or agent of, or acting in any capacity *other than as traveller taking orders*" carry on the business of a company without a license. It is evidently assumed, though not mentioned, that business by correspondence is not affected; and the absence of the disabling clause leaves such business immune as a matter of practical effect.

4. *Nova Scotia Act*.—The Province of Nova Scotia in 1904 passed an amendment<sup>12</sup> to the Act dealing with "General Provisions respecting Domestic and Foreign Companies"<sup>13</sup> making it obligatory for "every incorporated company doing business in Nova Scotia, and having gain for its purpose or object" to pay an annual registration fee based on its nominal capital. Two schedules of fees are given, one for companies incorporated by the Province of Nova Scotia or by the Dominion, and the other for companies not so incorporated. The fees in the first schedule are one-half those in the second. Companies both domestic and foreign are required to submit annual statements of their affairs. A penalty of one hundred dollars is imposed for neglecting or refusing to transmit the registration fee or the statement. A penalty of ten dollars per day is also imposed upon the officers or representatives of the company transacting business without having submitted its annual statement. No definition is given, however, of the phrase "carrying on business" and there are no reported cases in which it has been applied as including business by correspondence.<sup>14</sup> Nor is there in the Nova Scotia Act a provision disabling companies from suing upon obligations contracted in connection with business in the province. The Act does not require the appointment of an attorney nor the establishment of a head office within the province.

12. 3 Edw. VII. c. 24.

13. R.S.N.S., c. 127.

14. See *Halifax v. McLaughlin*, 39 S.C.R. 174

5. *Prince Edward Island Act*.—In the Province of Prince Edward Island “an Act to impose Certain Taxes on Certain Companies and Associations of Brewers,” passed in 1900, imposes, among a variety of other taxes, one of \$100, per year, “upon all incorporated companies and associations” doing business in the province, “whose principal office and organization is not within the province other than those previously enumerated.” In 1902, there was inserted after the word “enumerated” the following: “by themselves or by their agent residing in the province, by selling any goods, wares or merchandise in the province, or by soliciting or canvassing for others, either by themselves or by their said resident agent for the sale, exchange or purchase of any goods, wares or merchandise within the province, either by the production of samples, photographs, catalogues, printed or written matter, or simply by word of mouth, without the production of samples, photographs, catalogues, printed or written matter.” It will be observed that this implies that the Act does not apply to non-resident agents. The repeal, in 1909, of the “Commercial Travellers” tax left business by non-resident travellers or by correspondence free. There has been no legislation corresponding to that of Ontario.

6. *Peculiarity of British Columbia Act*.—The peculiarity of the British Columbia Act<sup>15</sup> is that it contains no such excepting provision as those in the other Acts which define “carrying on business.” There was such a provision in the draft of the revised Act as introduced, but it was struck out in Committee. This leaves the Act to cover what the Acts of none of the other provinces do, viz., business by correspondence and non-resident travellers. The Act moreover contains penalty clauses as strict as those of any of the Acts of the other provinces. Companies carrying on any of their business in British Columbia, no matter, apparently, how occasional or casual it may be, are liable to a penalty of fifty dollars per day upon the company and twenty dollars per day upon its agents. As prosecutions for the

15. 10 Edw. VII. c. 7.

penalties can be entered only with the consent of the Attorney-General, the administration of this feature will depend upon the disposition of the provincial government. But the provision which disables unlicensed companies from suing in the courts is a menace to even occasional business transactions with outside companies, and is a standing invitation to dishonest debtors to repudiate their obligations by taking refuge behind the Act. If for instance a mining company in the province should order a piece of machinery from the East or from the United States or from England the selling company would not be safe in sending the machinery unless it had a license to do business in the province, and a head office and resident attorney. The company might, indeed, escape the penalties of the Act, if it had no property in British Columbia; for the provincial authorities would scarcely pursue it to its own country, but it would be obliged to demand payment in cash before sending the machinery, and such a condition is under modern methods of business prohibitive.

Moreover the conditions which must be complied with before a license is obtainable are extremely onerous. The company must file with the registrar of companies a copy of its charter and articles of association and all its by-laws, rules and regulations and all resolutions and contracts relating to or affecting the capital and assets of the company. This preposterous requirement is in many cases a more serious obstacle than the payment of the fee. It can readily be understood that an extra-provincial or foreign company would hesitate, even for the sake of a large business in a single province, to display upon a public register the information thus demanded. It is still more unreasonable to demand it of a company whose transactions are only casual. It may be that as a matter of practice the occasional business of unlicensed companies would not be interfered with by the provincial authorities, but it is not conducive to respect for law that such a provision should remain upon the statute books to be constantly violated or to be enforced only according to the ability or caprice of the officials.

#### V. THE PROBLEM TO BE SOLVED.

It must be assumed that the framers of the British North America Act in giving to the provinces the power to incorporate companies with provincial objects did not intend that the provinces should have the power to interfere with companies operating under Dominion charters, and to prevent them from exercising their chartered powers until they had complied with provisions which are in themselves as onerous as the taking out of a new charter. Granted the provinces may tax business within the province, it is questionable whether they are competent to prevent companies, at all events those incorporated by the Dominion, from doing business until the tax is paid, or to impose disabilities of status incapacitating them from enforcing their rights by an appeal to the courts.

The Supreme Court may be expected to give to the subject the careful consideration to which its importance entitles it. And if the matter is carried further it is to be hoped that no small partisan spirit on the part of the provinces or the Dominion, and no carping assertion of "federal rights" or "provincial rights" will stand in the way of having the questions dealt with in a manner consistent with the magnitude of the interests involved.

There is, in fact, room for constructive statesmanship of the highest order in dealing with the whole question of corporation law in this country. Constitutional law is being constantly made by decisions of the courts in concrete cases, and although in theory the courts are confined to a strict and impartial interpretation of the written constitution, it needs no argument to demonstrate that a chance decision on a hard set of facts, in which the constitutional questions are inadequately argued, or ignored, may influence the whole course of constitutional development. When the British North America Act was passed, the subject of corporation law occupied no such place as it does to-day, and the difficulties that have arisen could scarcely have been anticipated. There are certain companies which can be

more conveniently dealt with by local authority, and there are others that should be under a central administration. Could not the provinces and the Dominion get together, and, without reference to the exigencies of revenue or of party politics, work out a constitutional scheme of administration of corporation law, not on the basis of what the British North America Act might be made to mean, but what will be most conducive to a harmonious development of our federal constitution, and an efficient control over this form of organization. In doing so the provinces need not relinquish any of their powers of taxation, and the Dominion would still retain, in virtue of its jurisdiction over other subjects, a sufficient measure of control in the interest of the country at large.

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*JUDGES ENGAGED IN OTHER THAN JUDICIAL DUTIES.*

The dangers which arise from judges undertaking duties and responsibilities outside of their proper sphere of action, and the apprehension with which such departures from their proper function is regarded in the old country are pointedly set out in the following letter which appeared under the title, "Judges as Directors," in a recent number of the *Times*.

"Since the disastrous and deplorable failure of the Law Guarantee Trust and Accident Society some of the shareholders have stated that they were influenced in buying shares not only in consequence of the high professional standing of the solicitors who were the directors, but also on account of the fact that two well-known judges were the trustees. There has now grown up a strong feeling, both in the profession and out of it, against the present state of things, . . . A judge's salary is £5,000 a year, and he is allowed for his expenses on circuit the liberal sum of £7 10s. a day, so that it can hardly be necessary for him to augment his income by directors' fees or trustees' fees. The great dignity and high position of the judges will, I am sure, be better maintained if they cease to act as directors or trustees of public companies, unlimited or limited, and the objection to

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their acting in either of these capacities is not removed by the statement that these companies are in a sound and prosperous condition."

We wonder what the writer would say of judges who hold extra judicial positions in defiance of express legislation. The above letter hints at the lure of money as being the moving cause of what is said to be the above objectionable practice. It is quite true that judicial salaries in Canada, except perhaps to those paid to some judges in the Province of Quebec, are inadequate; but when members of the Bar go on the Bench they do so with their eyes open in this respect. Whether it is for the money that is in it, or for some other reason, that a certain judge of the High Court of the Province of Ontario still retains his seat on the Board of Directors of a Trust Company, contrary to the statute in that case made and provided, we know not. We have already called attention to this matter, but the evil continues. This apparently persistent breach of a statute by a judge, unless indeed there is some good reason which as yet does not appear, is not a very edifying spectacle. If there is any explanation to be given, or if there is any good reason why the learned judge does not come within the statute, it would be well that such explanation should be made public, either by the Board of the Trust Company or in some other appropriate manner; for it certainly is most undesirable that the public should be under any wrong impression in this matter, if it is wrong. Even if there is no technical breach of the Act, good taste would require the observance of its spirit.

The statute (R.S.C., c. 138, s. 33) seems sufficiently clear. It is as follows: "No judge of the Supreme Court of Canada or of the Exchequer Court of Canada, or of any superior or County Court in Canada shall, either directly or indirectly, as director or manager of any corporation, company or firm, or in any other manner whatever, for himself or others, engage in any occupation or business other than his judicial duties; but every such judge shall devote himself exclusively to such judicial duties."

*COMPANY LAW.*

## QUESTIONS SUBMITTED TO THE SUPREME COURT.

The Committee of the Privy Council of the Dominion of Canada having had under consideration a report, dated 2nd May, 1910, from the Minister of Justice stating that important questions of law had arisen as to the respective legislative powers under the British North America Acts of the Dominion of Canada and the Provinces of Canada in relation to the incorporation of companies and as to the other particulars hereinafter stated, decided that it was expedient that these questions should be judicially determined.

The Minister accordingly recommended that under the authority of s. 60 of the Supreme Court Act, R.S.C. 1906, c. 139, the following questions should be referred by the Governor-General-in-Council to the Supreme Court of Canada for hearing and consideration namely:—

1. What limitation exists under the "British North America Act, 1867" upon the power of the provincial legislatures to incorporate companies?

What is the meaning of the expression "with provincial objects" in s. 92, art. 11, of the said Act? Is the limitation thereby defined territorial, or does it have regard to the character of the powers which may be conferred upon companies locally incorporated, or what otherwise is the intention and effect of the said limitation?

2. Has the company incorporated by a provincial legislature under the powers conferred in that behalf by s. 92, art. 11, of the British North America Act, 1867, power or capacity to do business outside of the limits of the incorporating province? If so, to what extent and for what purpose? Has the company incorporated by the provincial legislature for the purpose, for example, of buying and selling or grinding grain, the power or capacity, by virtue of such provincial incorporation, to buy or sell or grind outside the incorporating province?

3. Has a corporation constituted by a provincial legislature with power to carry on a fire insurance business, there being no stated limitation as to the locality within which the business may be carried on, power or capacity to make and execute contracts:

- (a) within the incorporating province insuring property outside the province;
- (b) outside of the incorporating province insuring property within the province;
- (c) outside of the incorporating province insuring property outside of the province?

Has such a corporation power or capacity to insure property situate in a foreign country, or to make an insurance contract within a foreign country?

Do the answers to the foregoing inquiries, or any and which of them, depend upon whether or not the owner of the property or risk insured is a citizen or resident of the incorporating province?

4. If in any or all of the above mentioned cases (a), (b) and (c) the answer be negative, would the corporation have throughout Canada the power of capacity mentioned in any and which of the said cases on availing itself of the Insurance Act, R.S.C. 1906, c. 34, as provided by s. 4, sub-s. 3?

Is the enactment, R.S.C. 1906, c. 34, s. 4, sub-s. 3, *intra vires* of the Parliament of Canada?

5. Can the powers of a company incorporated by a provincial legislature be enlarged, and to what extent, either as to locality or objects by

- (a) the Dominion Parliament?
- (b) the legislature of another Province?

6. Has the legislature of a province power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province unless or until the companies obtain a license so to do from the government of the province,

or other local authority constituted by the legislature, if fees are required to be paid upon the issue of such licenses?

For examples of such provincial legislation see Ontario, 63 Vict. c. 24; New Brunswick Cons. Stats. 1903, c. 18; British Columbia, 5 Edw. VII. c. 11.

7. Is it competent to a provincial legislature to restrict a company incorporated by the Parliament of Canada for the purpose of trading throughout the whole Dominion in the exercise of the special trading powers so conferred or to limit the exercise of such powers within the province?

Is such a Dominion trading company subject to or governed by the legislation of a province in which it carries out or proposes to carry out its trading powers limiting the nature or kinds of business which corporations not incorporated by the legislature of the province may carry on, or the powers which they may exercise within the province, or imposing conditions which are to be observed or complied with by such corporations before they can engage in business within the province?

Can such a company so incorporated by the Parliament of Canada be otherwise restricted in the exercise of its corporate powers or capacity, and how, and in what respect by provincial legislation?

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#### VACATION READING.

The Editor of *Law Notes* (U.S.A.), in his August number, provides his readers with some light literature suitable for holiday times. We gladly refer to some of them.

#### KILLING HABITUAL CRIMINALS.

The judicial putting to death of habitual criminals is not entirely new, but its treatment in the following note is somewhat original:—

Judge Holt of the United States District Court for the Southern District of New York, delivered an address at the recent annual meeting of the Wisconsin Bar Association.

Speaking of what he conceived to be a wise disposition of confirmed criminals, he said :

I would give him a fair trial. I would require proof that he had been a habitual criminal for a long term of years. I would give him an opportunity to make a full defence, and if finally it were established by clear proof that the man was one of those, numbers of whom exist in modern society, whose nature has been degraded by a life of undeviating wickedness into that of a wild beast, incapable of any substantial improvement or alteration, such a man, in my opinion, should be solemnly adjudged to be put to death. But if, in view of the squeamish sentimentality of this age, such a course be deemed impracticable, I should shut him up for life where he could do no more evil to society.'

Emanating from one who is supposed to have some acquaintance with Beccaria's famous treatise, the foregoing is so strangely unscientific that it hardly merits a word in reply. If a common thief or robber is to suffer death, of course theft or robbery will more frequently be accompanied by murder. A rational criminal will know that he may as well slay the witness to his crime. The argument is familiar, unanswerable, and decisive against the infliction of capital punishment for crimes of less enormity than murder.

In the opinion expressed by Judge Holt we think he unconsciously gives substantial support to the assertion by enemies of religion that infidelity is steadily infecting educated people and creeping into high places. Is Judge Holt losing faith in the miraculous efficacy of prayer, and in the divine power to regenerate even the most depraved of men? Only a few years ago there lived in New York city an uneducated man who was well qualified to debate with Judge Holt, and on equal terms, the question whether an habitual thief ought to be executed; his name was Jerry McAuley, and quite likely Isaiah 55: 8 would have been cited by him.

#### SCORING JUDGES.

The interchange of views promoted by the various Bar Associations of Anglo-Saxon countries and the research required for

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papers read at their meetings are features of interest to the profession these days. The Ohio Bar Association recently passed a resolution upon which our exchange makes its comments. They are as follows:—

“Whereas it is the sense of the Ohio Bar Association that the Supreme Court should in all cases give some clear indication of the grounds upon which its decisions are based, in order that the bar and the people may know the views of the court as to the law involved, now, therefore, be it resolved that the Supreme Court and each of the judges thereof be and are hereby requested in every case hereafter decided to indicate clearly in some appropriate form, the exact point or points on which the decision rests, and the reasons influencing the court, in order that all uncertainty may be dispelled. And by direction of the association a copy of the foregoing resolution, unanimously adopted July 7, was sent to each of the judges of the Supreme Court. Volume 80 of the Ohio State Reports ends with ‘memoranda of cases decided and reported without opinion during the period embraced in this volume,’ comprising a list of about two hundred cases. But the judgment of the lower court was affirmed in all but six or eight of them. In each case the names of the counsel are printed. How would the counsel for a defeated party like to see his name followed by a sentence which we quote from Judge Cartwright’s opinion in 236 Ill. 369, 88 N. E. Rep. 151: ‘If attorneys have not yet learned of this obvious proposition by its wearisome repetition in so many cases, it would seem to be of no use to state any principle of law in the decisions of this court’? And suppose it was a case of memorandum affirmance where the court could say, as in *Indianapolis St. R. Co. v. Taylor*, 39 Ind. App. 592, 80 N.E. Rep. 436, ‘Ninety-five reasons are given why a new trial should have been granted the appellant in the court below.’ Or suppose the court filed a memorandum reason that the party’s case is ‘a structure the foundation of which is inference, its walls are suspicion, and covered with the roof of the imagination, but withal it is nothing but a shadowy phantom, without legal substance,’ as in *In re Gilion’s Will*, 44 N.Y. App. Div. 621, 60 N.Y. Supp. 65, 68.”

**ECCENTRIC REPORTERS.**

The mental vagaries of reporters are discussed in a note entitled "Mental diversions for lolling lawyers." We could match some of these in this country. The weather, however, is too warm to do more than refer to one which comes to our mind as we write. In the digest to a volume of the Upper Canada Common Pleas Reports appeared the title "Sue." Curiosity induced an enquiry as to whether this short word had reference to any litigation anent any black-eyed Susan, but it appeared that the rest of the sentence was "Right of Foreign Corporations to, in this country." We decline to do more than refer to the old story of "Great mind" as an index word in an old English Digest. Our contemporary's research appears in the following:—

A few minutes of gentle intellectual exercise for lawyers relaxing on the summer hotel verandah can be got out of the reporter's indexes to volumes 55 and 56 of the Texas Criminal Reports. Read aloud some of the titles in those indexes—all the black-letter words are titles, and there are no sub-divisions—and ask your professional neighbour to guess what sort of a case is indexed under each of the titles named. Thus: "Bad Spelling." Little doubt about that if he is aware that you are reading from a criminal report; it was a motion to quash an information because of bad spelling. "Cooling Time," a murder case of course, says your friend. "Adequate Cause," "Inadequate Cause," "Insult to Female Relative," and "Jealousy" are also murder cases, he will say, if he knows that it is a Texas report. And "Appearance of Danger" will not suggest a contributory negligence case. But "Contemporaneous Transaction" should compel him to scratch his head. Here is the case: "Upon trial for violation of the local option law there was no error in shewing on cross-examination of the defendant that *he had whiskey on hand* like that which he was alleged to have sold to the prosecuting witness." Nor has the Texas reporter put a "bromidic" paragraph under "Conditional Promise." It reads as follows: "Whereupon trial for seduction"—your companion interrupts you by correctly guessing the premise and the condition.

"Juxtaposition," a prize riddle, is thus solved: "Where upon trial for murder the evidence shewed that the defendant was in such *juxtaposition to the homicide* as to exclude any other issue than that of positive testimony, a charge upon circumstantial evidence was not required." By the way, in volume 56, Texas Criminal Reports, the index title "Murder" covers forty-four paragraphs and twenty-seven cross-references to other titles. "Manslaughter," a mollycoddle offence in Texas, carries only six paragraphs and two cross-references. In a guessing bee based on that index the man who adopts the answer "homicide" as a "system" is likely to defeat all competitors in the long run. But he would score a cipher if asked what is the second word of a title consisting of two words, the first of which is "Shooting," for it is not a homicide case. Is it the name of a kind of animal? Why, no; it is "Craps." How many lawyers can state exactly what is meant by the reporter's title, "Doctrine of Carving"? Is it antonymous of the familiar "doctrine of tacking" of incumbrances? We are pretty sure that Bishop, Wharton, and other text-writers on criminal law would be startled to learn that "carving" had become a word of art or attained to the dignity of a doctrine. In the case cited it was held that, under the Texas statute, "the State can only carve one offence of opening a theatre on Sunday"—that is on a single Sunday. A strenuous and virile word in the Texas reporter's lexicon is "Want." It does him this yeoman service: "Want of Authority," "Want of Chastity," "Want of Consent," "Want of Diligence," "Want of Fraudulent Intent," and "Want of Knowledge"—of proper titles for a creditable index to a law report?

#### PROFESSIONAL ETHICS.

A point in professional ethics which has troubled a few lawyers and a great many laymen for centuries past is thus discussed:—

Paragraph 5 of the Code of Professional Ethics promulgated by the American Bar Association reads as follows: "A

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lawyer may undertake with propriety the defence of a person accused of crime, although he knows or believes him guilty, and having undertaken it he is bound by all fair and honourable means to present such defences as the law of the land permits, to the end that no person may be deprived of life or liberty but by due process of law." That is to say, if a perfectly sane man confesses to his lawyer that he committed the act for which he is prosecuted, and the evidence adduced against him leaves not a glimmering of doubt in the lawyer's mind that the confession is true, it is the lawyer's duty "by all fair and honourable means to present such defences as the law of the land permits." No "defences" within any just meaning of that term can be presented other than (1) that the act charged is not a crime, or (2) that the accused did not commit the act, or was irresponsible. It is conceded that the first defence is not available, for by the terms of the canon the lawyer *knows* that his client is *guilty*; or if there be a doubt in point of law it may readily be admitted that the lawyer need not and should not hesitate to argue the point. As to the second defence—*i.e.*, the question of fact—the lawyer knows that it is false. Nevertheless, "by all fair and honourable means"—for example, by argument to the court against the admissibility of evidence—he may properly be instrumental in preventing the jury from hearing evidence which might convince them of the fact of guilt. But how about his argument to the jury on the evidence before them? If a felon were fleeing from officers of the law in hot pursuit of him, and a railroad station agent or conductor of a train, knowing him to be guilty and attempting to avoid immediate arrest, should sell him a ticket or provide him with free transportation and thus enable him to escape, is it not clear that the agent or conductor would be punishable as an accessory after the fact? This offence is committed by any one who knowingly "assists the felon to elude justice." *Reg. v. Hansill*, 3 Cox C.C. 597, per Erle, J. Does not a lawyer "assist" his known-to-be-guilty client "to elude justice" by successfully employing his talents to persuade jurors that a verdict of guilty will shew that their

reasoning faculties are out of joint? Would it be "fair and honourable" for him by artful advocacy to induce the jury to believe the evidence of guilt is insufficient, when he feels, apart from the private confession of his client, that it logically suffices to exclude reasonable doubt from any rational mind? Is the railroad station agent or conductor under any greater obligation to the community in the matter of apprehension and punishment of felons than the lawyer? Isn't a criminal's right to have a lawyer befuddle a jury as far removed from those hallowed phrases "law of the land" or "due process of law" as a man's right to transportation by a common carrier?

Let us go a step farther and suppose that the lawyer advises or even silently permits his guilty client to take the witness stand and swear to his innocence, and then uses the testimony as an argument to the jury to render a verdict of acquittal. Can this conduct be ethically reconciled with the ruling of the New York Supreme Court in *In re Hardenbrook*, 135 N.Y. App. Div. 634, 121 N.Y. Supp. 250? In that case, decided last December, upon argument before Justices Ingraham, Laughlin, Clarke, Houghton, and Scott, the respondent, an attorney-at-law, was disbarred for conduct exactly described in the judgment as follows:—"It is sufficient if, taking the testimony as a whole, the respondent was proved to have had direct knowledge that the client for whom he appeared, and in whose favour he asked a verdict, had sought to recover on perjured testimony, and, with such knowledge, continued the prosecution of the action, insisting upon the right of his client to a judgment although he knew that her testimony was false. If this was satisfactorily established, it would seem to follow that he had been guilty of such unprofessional conduct as to require discipline. It is not essential in such a case that the attorney or counsel took affirmative action to induce his client to swear falsely, or, in other words, suborned the perjured testimony; but if an attorney, with knowledge of the fact that the testimony upon which his client is seeking to sustain a claim before the court is false and known to his client to be false, so that his client

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in giving the testimony is guilty of perjury, insists upon the truth of the testimony and endeavors to procure a verdict in his client's favour, it is certainly deceit and malpractice within the provisions of section 67 of the Code of Civil Procedure."

The case in which the attorney was employed was a personal injury action for a contingent fee, and the court held that the fact of his interest in the result of the controversy merely aggravated his offence.

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In the July number of the *Law Quarterly Review* there is an interesting note of the case of *Anna Rama v. G.I.P. Ry. Co.*, 12 Bombay Law Reports 73, which is said to be a case of first impression so far as regards English and Indian authorities. It was an action for negligence. It appears that the arm of the plaintiff, a passenger who was leaning out of a railway carriage in an up train, was struck and injured by the door of a carriage in a down train, the door having been left open. It was held that a passenger who puts his arm or any part of his person outside the train does so at his own risk, and undoubtedly so if there is an express warning against this practice. It does not appear from this note whether the plaintiff had his attention drawn to any such warning, nor is it probable that he was in the position of the man in the apocryphal story which recounted that he saw a notice warning passengers to "Keep your head out of the window." Obeying the injunction he suffered injury and naturally thought he was badly treated. The writer of the note in the *Law Quarterly* after referring to the fact that warnings are common in Europe says:—

"They seem rather to assume that, in the absence of warning, it is not necessarily rash or unreasonable to lean out of the window; and on the frequented lines of Central Europe notices are often in two or even three languages, whereas here the notice was only in English, a point not mentioned in the judgment. It was argued for the company that its contract was only to carry passengers inside the carriages and not outside; this is cleverly

put, but really a neat way of begging the question. But it does seem that the passenger, if he knew of the warning, did not act as a commonly prudent man. He was indeed not bound to anticipate that the doors of other trains on the line would be negligently left open; on the contrary he had a right to expect that they would be kept fastened; and this reason at first sight appears to be strong in his favour. The weak point of it is that open doors on other trains are, as a matter of fact and common observation, by no means the only danger to which projecting heads or limbs may be exposed: there may be very little clear space in passing through tunnels, covered bridges, and the like; and an express warning reminds the passenger of this kind of risk if it is not already notorious. It cannot be said, therefore, that he was not bound to be cautious. Then, if the passenger does put his arm outside, he can still keep a look-out, and draw it in when another train is passing. And on the whole it seems, even without any express warning, that not to keep any lookout for possible objects of collision is recklessness in fact amounting to negligence in law. On the other hand (subject, perhaps, to mere possibilities of exceptional circumstances which, if they had existed, it was the plaintiff's business to prove) it is plain enough that the company had no means of avoiding the result at the last moment: therefore the finding for the defendant, on the ground of contributory negligence, was in our judgment correct. As to the inference of negligence against the company in the first instance from the fact that a carriage door in a moving train being left open, there is no difficulty: *Toal v. North British Railway Company*, [1908] A.C. 352."

**REVIEW OF CURRENT ENGLISH CASES.**

(Registered in accordance with the Copyright Act.)

**ORDER FOR PAYMENT OF COSTS OF MOTION—ACTION TO RECOVER COSTS PAYABLE UNDER ORDER.**

*Seldon v. Wilde* (1910) 2 K.B. 9. This was an action brought to recover a sum payable for costs under an order of court. The defendant contended that the statement of claim shewed no cause of action, and was an abuse of the process of the court. The order was made in the Chancery Division on a motion to commit the defendant for not delivering his bill of costs as a solicitor, and it was contended that the order was equivalent to a decree in Chancery on which no action would lie, because no promise can be implied at common law to pay an equitable debt. But Darling, J., held that the same order would be made at law in the like circumstances, and there was therefore no ground for calling it a mere "equitable debt"; and the contention that the order was of a criminal nature was held to be equally untenable, and he held that the action was maintainable, and gave judgment for the plaintiff.

**LANDLORD AND TENANT—COVENANT NOT TO SUBLLET—RE-ENTRY FOR BREACH OF COVENANT—BREACH OF COVENANT—SURRENDER—ACCEPTANCE OF SURRENDER IN IGNORANCE OF BREACH OF COVENANT—RE-LETTING BY LESSOR—ENTRY BY NEW TENANT—RIGHT OF SUB-LESSEE.**

*Parker v. Jones* (1910) 2 K.B. 32 is a curious case on the law of landlord and tenant. One Smith let to Harner a parcel of land the lease containing a covenant by Harner not to sub-let without leave with a proviso for re-entry by Smith in case he committed a breach of the covenant. Unknown to Smith, Harner in breach of his covenant, sub-let to the plaintiff Parker, and thereafter Harner surrendered his lease to Smith who accepted the surrender still in ignorance of the breach of covenant. After the surrender Smith re-let the premises to the defendant Jones, who finding Parker's cattle on the premises turned them out and took possession under his lease, and Parker thereupon brought the present action to recover possession and also damages for trespass. The case was tried in a County Court and

judgment was given for the defendant, but the Divisional Court (Darling and Bucknill, J.J.) reversed the judgment, but for different reasons. Darling, J., taking the ground that assuming Smith was not precluded by the acceptance of the surrender from enforcing his right to forfeit the plaintiff's interest, inasmuch as Smith had accepted the surrender without notice of that interest; still the re-letting of the premises to a new tenant and entry by that tenant, did not operate as an entry by Smith so as to effect a forfeiture and therefore the plaintiff's interest was still subsisting. Bucknill, J., on the other hand, was of the opinion that the acceptance of the surrender by Smith even though in ignorance of the breach of covenant, precluded him from subsequently forfeiting the plaintiff's interest.

**COMPANY—WINDING-UP—OFFICIAL RECEIVER AND LIQUIDATOR—  
FRAUD—EXAMINATION OF PERSON CHARGED—PERSON EXCUL-  
PATED FROM CHARGE OF FRAUD—JURISDICTION TO ORDER RE-  
CEIVER TO PAY COSTS PERSONALLY—COMPANIES WINDING-UP  
ACT, 1890 (53-54 VICT. c. 63), s. 8—(R.S.C., c. 144, s. 121).**

*In re Tweddle & Co.* (1910) 2 K.B. 67. A limited company having been ordered to be wound up, the official receiver, who was also liquidator reported under the Winding-Up Act, 1890, s. 8, that in his opinion the facts reported by him constituted a fraud in the promotion or formation of the company, and that certain persons named in the schedule were parties to the fraud. Among the persons so named was one Easten, a director, and on this report he was ordered to be examined. After his examination he applied to the judge for an order exculpating him from the alleged fraud and the order was granted, and the receiver was directed to pay his costs of the examination and of the application for the exculpatory order, and there being no assets of the company, the judge ordered the receiver personally to pay them. On appeal by the receiver to a Divisional Court (Darling and Bucknill, J.J.), those learned judges held that there was no jurisdiction to make an order against the receiver personally. Darling, J., being of the opinion that the receiver had made the report on which the examination was made in the discharge of his duty fairly and honestly, and without any misconduct; and Bucknill, J., taking the ground that even if the judge had power to make the order, in the circumstances, he ought not to have made it. We notice, however, that the Court of Appeal have taken a different view, and have come to the

conclusion that as the official receiver had taken up the position of a litigant and appeared and opposed the application for the exculpatory order the judge had jurisdiction to order him to pay the costs of that motion: see 129 Law Times Jour., p. 239.

**LANDLORD AND TENANT—DISTRESS—EXEMPTION FROM DISTRESS—  
“GOODS COMPRISED IN HIRE PURCHASE AGREEMENT”—“POSSESSION ORDER OR DISPOSITION”—“REPUTED OWNERSHIP”—  
GOODS OF WIFE OF TENANT UNDER HIRE PURCHASE AGREEMENT  
—DISTRESS AMENDMENT ACT, 1908 (8 EDW. VII. C. 53), S. 4—  
(R.S.O., C. 170, S. 31).**

*Shenstone v. Freeman* (1910) 2 K.B. 84. In this case the plaintiff sued for the wrongful seizure of goods in distress, on the ground that they were exempt under the Distress Amendment Act, 1908 (8 Edw. VII. c. 53), (see R.S.O., c. 170, s. 31). The goods in question consisted of a piano let by the plaintiffs to the wife of the tenant on a hire purchase agreement in consideration of monthly payments and subject to a condition that on default the plaintiffs might retake possession. At the date of the seizure the monthly payments were in arrear. The English Act, while exempting the property of third persons, provides that such exemption is not to extend to the goods belonging to the husband or wife of the tenant, nor to goods comprised in any bill of sale, hire purchase agreement, or settlement made by the tenant, nor to goods in the order and disposition of the tenant by consent of the true owner under such circumstances that the tenant is the reputed owner. The question, therefore, was, whether the piano was within the exception, and the Divisional Court held that it was not, the piano not being the property of the wife of the tenant, and not being held by the tenant under a hire purchase agreement made by him.

**CARRIER—DANGEROUS GOODS—NEGLECT TO GIVE NOTICE TO CARRIER OF DANGEROUS CHARACTER OF GOODS TENDERED—IMPLIED WARRANTY THAT GOODS TENDERED FOR CARRIAGE ARE NOT DANGEROUS—DUTY OF CONSIGNOR.**

*Bamfield v. Goole & Sheffield Transport Co.* (1910) 2 K.B. 94. This was an action brought by the plaintiff in her own right and also as administratrix of her deceased husband under the Fatal Accidents Act to recover damages personally to herself, and also pecuniary damages sustained by the death of her husband in the following circumstances. The husband was owner

of a canal boat and the defendants tendered him for carriage thereon a consignment of ferro-silicon in barrels as "general cargo." This substance is dangerous owing to its liability to give off poisonous fumes. In the course of transit the poisonous fumes were given off, the husband died from its effects, and the plaintiff who was also on the boat assisting her husband was rendered seriously ill. Walton, J., who tried the action, gave judgment for the plaintiff in both capacities. And his judgment was affirmed by the Court of Appeal (Williams, Moulton, and Farwell, L.J.J.). Walton, J., had found as a fact that the defendants did not know, and that they were not guilty of negligence in not knowing that ferro-silicon was dangerous, but notwithstanding Williams, L.J., was of the opinion that when shipping such an article it was their duty to communicate to the plaintiff's husband such information as they had as to the nature of the article and therefore to describe it as ferro-silicon, and not as general cargo, and by reason of that neglect of duty they were liable. Moulton and Farwell, L.J.J., on the other hand, held that there is an implied warranty by a consignor that the goods delivered are fit for carriage, and unless the carrier knows or ought to know that they are dangerous, the consignor must be taken to warrant that they are not dangerous.

#### MARINE INSURANCE—POLICY—WARRANTY—FREE FROM PARTICULAR AVERAGE AND LOSS.

*Otago Farmers' Association v. Thompson* (1910) 2 K.B. 145. This was an action on a marine insurance policy. The policy covered a cargo of frozen meat and the period of the risk was stated as follows: "Risk commencing at the freezing station works and includes a period not exceeding sixty days after the arrival of the vessel." It also contained the following clause: "Warranted free from particular average and loss unless caused by stranding, burning, or collision of the ship or craft." Owing to causes arising during the voyage, other than "stranding, burning, or collision" of the ship, the meat arrived in a condition unfit for human food, and was condemned, and there was a total loss. Hamilton, J., found as a fact that the expression "warranted free from particular average and loss" was a well-known formula used in connection with insurance of frozen meat, and that the word "loss" in that formula was well understood amongst underwriters to mean all loss total as well as partial, and that the clause, however inapt to express the meaning, was in fact in-

tended to mean that the underwriters only insured against marine risks of stranding, sinking, burning or collision; and he held that, notwithstanding the provision as to the risk continuing after the termination of the voyage, the clause had that meaning in the policy in question and therefore that the defendants were not liable.

**LANDLORD AND TENANT—RENT—ASSIGNMENT BY LESSEE OF PART OF DEMISED PREMISES—APPORTIONMENT OF RENT—VALUE OF SEVERED PARTS—DATE AT WHICH VALUE TO BE ASCERTAINED FOR FIXING APPORTIONMENT.**

In *Salts v. Battersby* (1910) 2 K.B. 155, the question to be determined was the date at which the value of two severed portions of certain demised premises should be ascertained for the purpose of fixing the apportionment of the rent. The action was brought in the County Court to recover rent, and it appearing that the defendant was only assignee of part of the demised premises, the judge held that he was only liable for part of the rent, and in making the apportionment he held that the proper way was to ascertain the proportion the area of the land assigned to him bore to the area of the whole plot under the original lease. On appeal, however, a Divisional Court (Darling and Bucknill, JJ.) held that this was not the proper method of making the apportionment, and that on the contrary the present relative value of the parcels must be ascertained, and the rent apportioned on that basis.

**SHERIFF—EXECUTION CREDITOR—LIABILITY OF EXECUTION CREDITOR FOR ISSUING EXECUTION ON SATISFIED JUDGMENT—WRONGFUL SEIZURE—FI. FA.—DEBT PAID BEFORE ISSUE OF EXECUTION—ABSENCE OF MALICE—TRESPASS.**

*Clissold v. Cratchley* (1910) 2 K.B. 244. This was an appeal from the judgment of the Divisional Court (1910) 1 K.B. 374 (noted, ante, p. 256). The action was for trespass in seizing the plaintiff's goods under an execution issued on a judgment which had been satisfied before the writ issued. There was no malice on the part of the defendants, and the writ had been issued in ignorance of the prior payment, and on that ground the Divisional Court held that the action would not lie. The Court of Appeal (Williams, Moulton and Farwell, L.J.J.), however, held that the defendants were liable and allowed the appeal and restored the original judgment in favour of the plaintiff.

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REPORTS AND NOTES OF CASES.

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Province of Ontario.

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## HIGH COURT OF JUSTICE.

Divisional Court—C.P.]

[May 17.

RE MOLSON.

WARD v. STEVENSON.

*Will—Probate—Two testamentary writings of different dates—Letters of administration with both annexed.*

Appeal by defendants from the judgment of the Surrogate Court of Northumberland and Durham which found that two testamentary writings of different date together contained the last will and testament of one Molson; and directing that letters of administration with the two writings annexed should be issued to the plaintiff. The first will appointed an executor and had a residuary clause disposing of the whole estate. The second will appointed the same executor, and was called "My last will." It did not in any way refer to the former document, had no revoking clause, no residuary clause, and did not dispose of the whole estate actually existing at the date of the deceased, so that as to the part undisposed of, if the second will alone were admitted to probate, there would have been an intestacy.

*Held*, that the decision of the Surrogate Court judge was correct. *In re Bryan* (1907), p. 125, 76 L.J.N.S.P. 30, distinguished.

*Dromgole*, for plaintiff. *W. Kingston*, K.C., for respondents.

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Falconbridge, C.J.K.B., Britton, J., Middleton, J.] [July 2.

HESSEY v. QUINN.

*Landlord and tenant—Rent—Excessive distress—Statute of Marlbridge—Damages.*

On appeal from the judgment of OSLER, J.A.,

*Held*, 1. That the statute of Marlbridge is not interfered with or modified by II George 2, c. 19, s. 19, (Imp.) and the latter statute did not apply to actions for excessive distress (see R.S.O. 1897, c. 342). *Whitworth v. Smith*, 5 C. & P. 250, is not in point. The statute of George II. is confined to irregular

ties or illegalities arising after the distress and has no application to the taking of an excessive distress.

2. In the case of an excessive distress there is a breach of a statutory duty to make a reasonable distress only, and some damages must be presumed; but even when a statute read that in such case the landlord should be "grievously amerced" nominal or nearly nominal damages were allowed unless substantial damages were shewn.

3. In this case there was no substantial damage. The bailiff had nominal possession only and did not interfere with the use and enjoyment of the goods and there was no reason for exemplary or punitive damages.

See *Piggott v. Birtles*, I.M. & W. 441; *Chandler v. Doulton*, 3 H. & C. 553; *Black v. Coleman*, 29 C.P. 507; *Rogers v. Parker*, 18 C.B. 112; *Lucas v. Tarleton*, 3 H. & N. 116.

*Creswicke*, K.C., *F. G. Evans*, and *J. M. Ferguson*, for respective parties.

Divisional Court—K.B.]

[July 16.

*COPELAND v. LOCOMOTIVE ENGINEERS' MUTUAL LIFE, ETC., ASSOCIATION.*

*Accident insurance—Total and permanent loss of sight—Practical loss of sight—Locomotive engineer.*

This was an appeal from the judgment of BOYD, C., who dismissed an action upon an accident insurance certificate of defendants' association. The plaintiff's claim was based upon the constitution and by-laws of the association, which provided that any member thereof "sustaining the total and permanent loss of sight in one or both eyes shall receive the full amount of his insurance." The plaintiff, who was a locomotive engineer, suffered an accident whereby there was, as found by the Chancellor, "a practical loss of sight so far as this man is an engineer," but on the evidence held that it could not have been said that he was totally and permanently blind.

*Held*, that, the plaintiff could not recover.

*Logan*, for plaintiff. *Hanna*, K.C., for defendants.

Sutherland, J.]

[July 20.

*RE McCACKEN AND TOWNSHIP OF SHERBORNE.*

*Liquor License Act—By-law limiting number of tavern licenses in township to one—Monopoly.*

This was an application to quash a by-law to limit the number

of tavern licenses in a township to one, reciting that the municipality had not the required population for more than one tavern license and it was expedient to limit the license list to that number. There were two existing licenses in the municipality. The bona fides of the council in making this reduction was not in question and the evidence indicated that one hotel was sufficient for the requirements of the public in the municipality.

*Held*, that, in view of s. 20 of the Liquor License Act and s. 330 of the Municipal Act no township council can pass a by-law to provide that the number of licenses should be limited to one, and in this case the result of the by-law would be to create a monopoly. By-law quashed.

*Haverson*, for applicant. *A. Mills*, for respondent.

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Meredith, C.J.C.P., Teetzel, J., Sutherland, J.] [July 27.

FORD v. CANADIAN EXPRESS CO.

*Malicious prosecution—Separate prosecution for forgery and theft—Reasonable and probable cause—Question for judge and not for jury.*

The plaintiff was formerly in the employ of White & Co., commission merchants. White & Co. obtained blank books of money orders from the Canadian Express Co. and the Dominion Express Company, and acted as agents for these companies for the purposes of their business only. A telephone message was received by the agent of the Canadian Express Co. asking that a book of money orders be sent to White & Co. The agent (named Mitchell) requested that an order for the same should be sent to them and on its receipt the book of money orders would be delivered forthwith. Shortly afterwards a man called at the Canadian Express office and handed in an order for the money orders written on White & Co. letter heads and signed White and Co. per Cohen. He received a book of money orders and signed a receipt for same. When the defendants went to White & Co. to collect for the book of money orders they first became aware that these orders had never reached White & Co. nor had they telephoned for them. Mitchell then wired the head office in Montreal to know if any of the orders had been cashed and asked them to forward any of the orders. On receiving the money orders Mitchell went to White & Co. and suspicion first fell on a former employee, then on the plaintiff, and two of the

employees of White & Co. informed Mitchell and a detective who had been brought in that the writing on the money orders resembled that of Ford's. Mitchell then obtained a quantity of Ford's writing from White & Co., and on the advice of the detective he took the writing to an expert in writing named Staunton, who remarked that there was a resemblance in some of the letters, but requested that the writing should be left with him over night. They however took the writing away without obtaining any further opinion and consulted the Crown Attorney informing him that the expert said it was Ford's writing, who gave directions for a warrant. This, however, was not obtained till the following day. The prosecution after several remands dropped the charge of forgery and charged the plaintiff with theft. On this charge the plaintiff was sent for trial and acquitted and Mr. Staunton, who was called by the Crown, gave it as his opinion that neither the order nor the receipt for the book was in the handwriting of the plaintiff, Ford. The plaintiff then commenced this action claiming damages in respect of

(1) False arrest. (2) Prosecution for forgery. (3) Subsequent prosecution for theft.

At the close of the plaintiff's case, defendant's counsel objected that the absence of reasonable and probable cause was not proved and that the defendants were not liable for the acts of Mitchell, their agent, who laid the information, and moved for a nonsuit. The motion was refused and the defendants adduced evidence in support of their defence. The trial judge put several question to the jury which were all answered in favour of the plaintiff, and the damages assessed down to the first arrest for forgery and the first remand were placed at \$1,500. From the first remand down to the time of the charge for forgery was abandoned \$750, and the damages in respect of prosecution for stealing at \$750.

Upon motion for judgment on the findings of the jury the Chief Justice ruled that there was an absence of reasonable and probable cause and directed that if the plaintiff so desired judgment should be entered in his favour for \$750, the damages awarded in respect of the prosecution for theft, leaving him to go to trial again on the other issue, as several of the questions which were intended to be submitted to the jury had not reached the jury and were not answered by them. The defendants then appealed to this Court on the following grounds.

(1) Absence of reasonable and probable cause was not shewn and the Chief Justice should have so ruled and have withdrawn the case from the jury.

(2) There was no evidence to warrant this submission to the jury of the question whether Mitchell in doing what he did was acting within the scope of his employment so as to make the defendants responsible for his action.

*Held*, 1. If the law is as it was laid down in *Hamilton v. Cousineau*, 19 A.R. 203, it may be that the Chief Justice was right in leaving to the jury the question which he put to them as to the honest belief of Mitchell, but the court was of the opinion that it was not, and that the effect of *Archibald v. McLaren*, 21 S.C.R. 515, was to overrule that case and to settle the law as far as the courts of this province are concerned in accordance with the views expressed by Armour, C.J. and Street, J., in the Divisional Court. Nothing appeared upon the evidence justifying even the suspicion much less the finding that Mitchell did not at the time he laid the information for forgery honestly believe the plaintiff to be guilty. So far as appeared Mitchell did not know him even by sight and had no motive for making a false charge against him, nor was there anything which warranted the submission to the jury of the question as to the defendants having taken reasonable care to ascertain the true fact of the case before Mitchell laid the information.

2. As to the prosecution for theft it should have been ruled that the plaintiff had established want of reasonable and probable cause.

3. Though the expert's opinion was that neither the receipt nor the order had been forged by the plaintiff, there was the evidence of the two employees that the plaintiff was the person who presented the forged order and signed the receipt.

*H. H. Dewart*, K.C., and *J. S. Lundy*, for plaintiff. *J. M. Ferguson*, for defendants.

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## Province of Nova Scotia.

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### SUPREME COURT.

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Graham, E.J.]

[July 29.

IN RE THOMAS McNUTT.

*Collection Act—Commitment for fraud—Form of Warrant—Commission—Presumption as to acts of.*

A warrant of commitment to gaol for fraud under the Collection Act, R.S. 1900, c. 182 was attacked on the ground

that it did not shew on its face that the debtor was a resident of the county for which the Commissioner who granted the warrant acted. Sec. 27 (2) of the Act contained the following provision: "The warrant of commitment may be in the form I. in the schedule, etc." The warrant in question exactly followed the form which did not require that the fact referred to should be shewn on its face.

*Held*, that the warrant was sufficient and that the application for the discharge of the debtor must be dismissed. *Re Baltimore*, 25 N.S.R. 106, distinguished.

*Held*, also, that it was to be presumed that the Commissioner acted rightly. *McKay v. Campbell*, 36 N.S.R. 522; *The Queen v. Silkstone*, 2 Q.B. 52; and *Taylor v. Clemstone*, 11 C. & F. 641, referred to.

*Power*, K.C., in support of application. *Ralston*, K.C., contra.

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Graham, E.J.—Trial.]

[August 8.

MILLER v. WEBBER.

*Fisheries—Net set without license—Fisheries officer justified in seizing—Powers of Dominion Parliament.*

*Held*, 1. Legislation prohibiting the use of nets of certain descriptions for the purpose of taking deep sea fish, except under special license, having in view the prevention of over fishing or the undue destruction of fish on the coasts of Canada, is reasonable and in the interests of the general public and is within the jurisdiction of the Dominion parliament to enact.

2. It is within the jurisdiction of the Dominion parliament to impose a license fee or tax as a condition of the issue of such licenses where granted.

3. It is a sufficient justification to a fisheries officer seizing a net set for the purpose of taking deep sea fish on the coast of one of the provinces of Canada to shew that it was set without license or the payment of the fee required.

*J. A. McLean*, K.C., for plaintiff. *Macilreith*, K.C., for defendant.

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**Province of Manitoba.****KING'S BENCH.**

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**Macdonald, J.]****[June 21.****DOMINION EXPRESS CO. v. CITY OF BRANDON.**

*Taxation—Corporations Taxation Act, and business tax levied by—63 & 64 Vict. c. 35, s. 2—Construction of statutes.*

The taxation imposed upon express companies for Provincial revenue by sub-s. (m) of s. 3, of the Corporations Taxation Act, R.S.M. 1902, c. 164, as re-enacted by 5 & 6 Edw. VII. c. 87, s. 7, is a business tax, being based partly on the number of its branch offices in the Province, and, since s. 18 of the same Act provides that, when a company pays such tax, no similar tax shall be imposed or collected by any municipality, the defendant city has no right to impose, under s. 2 of 63 & 64 Vict., a tax on the company in respect of its branch office in the city, such tax being expressly called a business tax by the last named Act. The original Corporations Taxation Act was assented to on the same day as the Act under which the defendants sought to impose the tax in question.

*Held*, that it must be presumed that the intention of the Legislature was that s. 18 of the former Act should govern and should exclude the tax under the latter Act. Injunction to go restraining defendants from proceeding under distress warrant to levy the tax in question.

*Coyne*, for plaintiffs. *Matheson*, for defendants.

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**Mathers, C.J.]****[July 1910.****DAVIES v. CITY OF WINNIPEG.**

*Negligence—Municipality—Liability of for non-repair of sidewalk.*

Under s. 667 of the Municipal Act, R.S.M. 1902, c. 116, or under s. 722 of the Winnipeg charter, 1 & 2 Edw. VII. c. 77, a municipality is not liable for the consequences of an accident caused by the want of repair of a sidewalk unless negligence on its part is shewn.

The plaintiff was injured by the tilting up of a loose plank in a sidewalk only ten years old which had been regularly inspected by an officer of the city without discovery of the defect

and no notice of the defect had been brought home to the city in any way. It appeared that the plank had got loose by the breaking of the nails and not by reason of age or decay of the wood.

*Held*, that the defendants were not liable.

*Howell and H. V. Hudson*, for plaintiff. *T. A. Hunt and Auld*, for defendants.

Mathers, C.J.]

[July 8.

MANNING v. CITY OF WINNIPEG.

*Municipal corporation—Contract of, without by-law—Employment of counsel by city—Acceptance of services—Liability of corporation on executed contract—Winnipeg charter, ss. 472, 833.*

The council of the city of Winnipeg has authority, under section 833 of its charter, 1 & 2 Edw. VII. c. 77, to employ counsel to conduct an inquiry into any matter connected with the good government of the city or with the conduct of any part of its public business; but such employment is not one of the matters which, under s. 472 of the charter, may be dealt with otherwise than by by-law.

When such employment was by resolution only and there was no formal acceptance of the work by the council, although the plaintiff had completed it according to his instructions, it was

*Held*, that he could not recover in an action against the city for the amount of his bill of costs rendered. *Arnold v. Poole*, 4 M. & G. 866; *Silsby v. Dunnville*, 8 A.R. 524; *Waterous v. Palmerston*, 21 S.C.R. 556; *Barrie School District v. Barrie*, 19 P.R. 33, and *Brown v. Lindsay*, 35 U.C.R. 509, followed. *Clark v. Cuskfield Union*, 21 L.J.Q.B. 349; *Haigh v. North Brierly*, E.B. & E. 873; *Lowford v. Billericay* (1903), 1 K.B. 772; *Bernardin v. Dufferin*, 19 S.C.R. 581, and *Emerson v. Wright*, 14 M.R. 636, distinguished.

*Hoskin, K.C.*, for plaintiff. *T. A. Hunt and Auld*, for defendants.

Mathers, C.J.]

[July 8.

DAVIS v. BARLOW.

*Parliamentary elections—Return of election made by returning officer—Jurisdiction of Court of King's Bench—Injunction—Breach of, by agent of defendant—Contempt of court—Manitoba Controverted Elections Act, R.S.M. 1902, c. 34.*

The Court of King's Bench has no jurisdiction to hear and

determine a complaint against the return of a member to serve in the Legislative Assembly of Manitoba otherwise than in proceedings under the Manitoba Controverted Elections Act, R.S.M. 1902, c. 34. *Regina v. Prudhomme*, 4 M.R. 259, followed.

The court has power, however, to deal with the defaults and misconduct of election officers and compel them to perform their public duties.

An interim injunction had been issued restraining the defendant, the returning officer, his servants and agents from delivering his return to the clerk of the Executive Council. Defendant had already handed the return to an express company for transmission, and the agent of the company was notified of the injunction, but delivered the return in spite of it.

*Held*, that such agent was liable to be committed, not technically for a breach of the injunction, but for a contempt of court tending to obstruct the course of justice: Kerr on Injunctions, 599.

*Hudson*, K.C., and *Coyne*, for plaintiff. *Dennistoun*, K.C., for defendant.

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**Mathers, C.J.]**

[August 1.

**RE SCHRAGGE AND CITY OF WINNIPEG.**

*Railway company—Compensation—Land injuriously affected, though not encroached upon by work—Winnipeg charter, 1 & 2 Edw. VII. c. 77, ss. (c) added to s. 708 by s. 15 of 3 & 4 Edw. VII. c. 64.*

Where the statute under which a claim was made for damages to land, caused by the construction of certain works and the closing up of certain streets, provided that any advantage which the real estate might derive from the contemplated works should be deducted from the sum estimated for damage done to the land in arriving at the compensation to be paid, and it was found that the detriment to the claimant's property caused by the closing of the streets was more than offset by the advantage accruing to it from the construction of the works, it was

*Held*, 1. The claimant could not recover anything in respect to such detriment.

2. Even if the detriment to the claimant's land should alone be considered, he is not entitled to compensation by reason only that he is, by the construction of a public work, deprived of a mode of reaching an adjoining district from his land and is obliged to use a substituted route which is less convenient, if the consequent depreciation in the value of his property is general

to the inhabitants of the particular locality affected, though his property may be depreciated more than that of any of the others. The claimant in such a case would have no right of action at common law, and therefore his land was not injuriously affected within the meaning of the statutes, the test in such cases being, would the complainant have a right of action if the work had been done without statutory authority? *King v. McArthur*, 34 S.C.R. 570, followed; *Chamberlain v. West End, Etc. Ry. Co.*, 2 B. & S. 617; *Metropolitan v. McCarthy*, L.R. 7 E. & I. App. 243; *Caledonian Ry. Co. v. Walker*, 7 A.C. 259, and *Tate v. Toronto*, 10 O.L.R. 650, distinguished.

*Elliott and MacNeill*, for claimant. *J. Campbell*, K.C., and *T. A. Hunt*, for City of Winnipeg.

Prendergast, J.]

[August 4.

EGGERTSON v. NICASTRO.

*Fraudulent conveyances*—27 Eliz. c. 4—*Voluntary settlement*—*Consideration*—*Subsequent purchaser for value*.

The wives of the defendants were sisters, and, on the death of Nicastro's wife, the defendant Pinaro, from motives of humanity and relationship, took over and afterwards maintained the infant children of Nicastro with his consent, as the latter was, through habitual and excessive drinking, unable to take care of them. About eight months afterwards, Nicastro conveyed to Pinaro the property in question, being all he had in the world, in trust for the maintenance of the children and Pinaro continued to support and maintain them. One year later, Nicastro gave an agreement of sale of the property to the plaintiff for a valuable consideration.

*Held*, 1. At the time of the conveyance to Pinaro, he had a good cause of action against Nicastro on the implied contract to pay for the support and maintenance of the children; and, as a pre-existing debt may be a valuable consideration, the deed was not voluntary in its inception. *Cracknell v. Janson*, 11 Ch. D. at p. 10, followed.

2. There was, at all events, an ex post facto consideration sufficient to support the deed in that Pinaro continued to maintain the children for a year before the conveyance to the plaintiff. *Prodgers v. Langham*, 1 Sid. 133; *Johnson v. Legard*, T. & R. at p. 294, and *Bayspole v. Collins*, L.R. 6 Ch. A. at p. 292, followed.

*Anderson*, K.C., and *Garland*, for plaintiff. *Graham and Fullerton*, for defendants.

## Book Reviews.

*A Manual of County Court Practice in Ontario.* By M. J. GORMAN, K.C., LL.B. 2nd edition. Toronto: Canada Law Book Co., Limited.

It is eighteen years since the first edition, and this new book was urgently needed as many important changes have been made in the jurisdiction of the courts and their equity jurisdiction, which had been taken away, restored and increased. As might have been expected, the work is well done, and we have before us a comprehensive and convenient compendium of County Court practice in the Province of Ontario, comprising the statutes and rules relating to the powers and duties of County and District Court judges and the jurisdiction, procedure and practice of County and District Courts and in appeals therefrom to the High Court with reference to Canadian and English decisions. A useful part of the work for practitioners is the tariffs of fees for County Courts and General Sessions. A number of special forms are also given. The writer in his preface criticises some of the legislation on this subject and his remarks are much to the point and well worthy of consideration for future use. The book has been almost re-written and will be most useful to the many practitioners who must necessarily have it on their office shelves.

*Criminal Proceedings on Indictment.* By E. B. BOWEN-ROWLANDS, Barrister-at-law. Second edition, 1910. London, Eng.: Stevens & Sons, Limited; Toronto: Canada Law Book Co., Limited. \$5.50.

This admirable work summarizes in the form of rules of practice the procedure of criminal trials, so much of which, both in England and Canada, is still dependent upon precedent and ancient custom. These rules are concisely stated, with annotations subjoined to each. Special pleas, motions to quash indictments, applications for postponement, challenge of jurors and the functions of the trial Judge are thoroughly dealt with from the standpoint of the experienced counsel.

A chapter on criminal jurisdiction includes the rules as to degrees of criminality, capacity to commit crime, accessories and venue; but, otherwise the subject matter is quite distinct from that usually found in books upon Crimes and Criminal Evidence.

What is evidence of a crime and what constitutes a crime are subjects which the author leaves to writers upon those subjects, except so far as it became necessary to include references to such matters as they affect procedure. An elaborate index covers seventy of the six hundred and seventy-five pages of this work, which we commend to Canadian barristers practising in the criminal courts.

*The Law of Maintenance and Desertion and Affiliation*, with the Acts for the Custody and Protection of Children. 3rd edition. By T. C. MARTIN and G. T. MARTIN. London: Stevens & Haynes, Bell Yard, Temple Bar. 1910.

The chapters on maintenance and desertion have been revised and notes have been added on marriage, agency of the wife, contracts of infants, and larceny by the husband or wife. These will be found very useful. Other portions of the book are not applicable directly to this country, but may often be helpful for reference.

*A short review of the Law of Bankruptcy*. By EDWARD MANSON, Barrister-at-law. 2nd edition. London: Sweet & Maxwell, Limited, 3 Chancery Lane. 1910.

The author brings the decisions up to date, and apologises for not leaving out cases, a practice which, he remarks, "gives a horrible sense of insecurity." This, however, depends a good upon circumstances.

*The Law Quarterly Review*. London: Stevens & Sons, 119, 120 Chancery Lane. July, 1910.

In addition to the notes, which are as interesting as usual and one of which has already been referred to in these columns (*ante p. 433*), the following articles appear in this number: The promotion of peace, by Mr. Roosevelt; The new judiciary; Burgage tenure in mediæval England; The return of a company's capital to its shareholders; The rule in *Re Cobbold*; The co-operative nature of English sovereignty; What is company law, etc., etc. These are followed by the usual masterly reviews of recent law books. Edited as it is by so learned a writer as Sir Frederick Pollock, the *Law Quarterly* is always interesting and instructive. In several places we see the mark of his masterly pen.

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## THE WATER-CARRIAGE OF GOODS ACT.

(9-10 Edward VII. chap. 61. Canada.)

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1. *Shipowner v. Cargo owner.*
2. *Cargo owner v. Shipowner.*

### XIII. SUMMARY.

### I. INTRODUCTORY.

The Parliament of Canada, at its last session, enacted The Water-Carriage of Goods Act, which will have an important influence on the future relations of shipowners and shippers, in respect to goods shipped from Canadian ports. It came into force on the first of September, 1910.

The Act effects a serious change in the law, in prohibiting and declaring void certain clauses in bills of lading, in respect of shipments affected by the Act, whereby the shipowner seeks to relieve himself from liability for the negligence of himself and those for whom he is responsible. It further defines and limits the respective rights and responsibilities of both parties to the contract, in a manner not hitherto attempted in Canada.

This legislation is based on the Act of Congress of the United States, commonly known as the "Harter Act," enacted in 1893, and on a somewhat similar Act of the Parliament of the Commonwealth of Australia, enacted in 1904. In fact, the Canadian bill, which matured into the present Act, was originally drafted upon the lines of the Australian legislation, but was modified in Committee, for the alleged purpose of placing Canadian shippers in a similar position to that of their United States competitors, under the Harter Act.

Legislation of a like character has, also, been enacted in New Zealand.

Previous Canadian legislation in respect to liability of carriers by water is contained in Part XVII. of The Canada Shipping Act.<sup>1</sup> This part applies to goods of any kind and deals with the responsibility of the carrier therefor. It is not stated whether it extends to contracts for the carriage of goods from Canadian to foreign ports as well as to Canadian registered vessels and Canadian coasting trade, or not; but it was probably intended that this part should have general application to all contracts of carriage by water made in Canada, and it would

1. R.S.C., c. 113, ss. 961 to 996 inc.

have that effect, inasmuch as they apparently are not repugnant to the provisions of any Imperial statute.<sup>2</sup>

Part XVII. of The Canada Shipping Act is not referred to in The Water-Carriage of Goods Act, either by a repealing clause or otherwise. Consequently The Canada Shipping Act is affected by the recent Act, only in so far as it is inconsistent with and repugnant to any of the provisions of the latter. In other words, The Canada Shipping Act must be read with The Water-Carriage of Goods Act, to the extent that one may be consistent with the other. In the event of inconsistency, the new Act must govern.<sup>3</sup>

## II. APPLICATION AND SCOPE OF THE NEW ACT.

1. *As to goods.*—Section 2 provides:—

2. In this Act, unless the context otherwise requires:—

(a) "goods" includes goods, wares, merchandise, and articles of any kind whatsoever, but does not include live animals;

(b) "ship" includes every description of vessel used in navigation not propelled by oars;

(c) "port" means a place where ships may discharge or load cargo.

This section is not found in the Harter Act. It appears from it that the Act applies to all goods and articles of any kind, except live animals. The Canada Shipping Act applies to "goods, wares or merchandise and articles of any kind whatsoever," without exception. The Harter Act applies to live animals, except section 1, excluding the contracts limiting liability for negligence, and section 4, imposing a duty to issue a bill of lading in accordance with the Act.

2. *As to ships.*—Section 3 provides:—

3. This Act applies to ships carrying goods from any port in Canada to any other port in Canada, or from any port in Canada to any port outside of Canada, and to goods carried by such ships, or received to be carried by such ships.

2. Colonial Laws Validity Act, 28-29 Vict. (Imp.), c. 63, ss. 2 and 3.

3. Maxwell, Statutes, p. 233.

The declaration in this section that the Act applies also to the carriage of goods "from any port in Canada to any port outside of Canada" is not found in The Canada Shipping Act provisions, but the section does not go so far as section 1 of the Harter Act, which applies that Act as well to all ships carrying goods to the United States from any foreign port. The broad application of the Harter Act in this respect has resulted in practically every line, transporting goods between American and foreign ports, incorporating the Harter Act in their respective bills of lading.

A discussion occurred, while the bill was before the Committee of the Senate, as to whether the new Act would apply to the carriage of goods, which originated in the United States, on a through bill of lading executed there and shipped from a Canadian port. It was considered that it would so apply. Section 3, applying the Act, as it does, to ships carrying goods from any port in Canada would appear to be broad enough to cover the point, particularly in view of the definition of the term "port" in section 2 (c). The Harter Act would not apply to such a shipment, though originating in the United States, inasmuch as it would not be the "transportation of merchandise or property from and between ports of the United States and foreign ports."<sup>4</sup> There would, therefore, be no conflict of law in this respect.

3. *In general.*—It has been held that the Harter Act does not apply as between charterer and shipowner;<sup>5</sup> nor to the relations of one ship to another, particularly in respect to collisions;<sup>6</sup> nor to passengers and their baggage.<sup>7</sup> It is possible that this jurisprudence would be followed by our own and the English courts.

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4. Harter Act, s. 1.

5. *Golcar SS. Co. v. Tweedie Co.* (1906) 146 Fed. Rep. 563.

6. *The North Star* (1882) 106 U.S. 17; *The Manitoba* (1895) 122 U.S. 97.

7. *The Rosendale* (1898) 88 Fed. 324; *The Kensington* (1899) 94 Fed. Rep. 885; also (1902) 183 U.S. 263; *La Bourgogne* (1906) 144 Fed. Rep. 781 (C.C.A.).

4. *Constitutionality.*—It was argued before the Committee of the Senate that the Act might be ultra vires of the Dominion Parliament, in so far as it applied to the carriage of goods from a Canadian to a foreign port, upon the ground that section 91, paragraph 15, of the British North America Act, in authorizing Parliament to legislate respecting "Navigation and Shipping," did not permit it to legislate respecting the carriage of goods beyond the limits of Canada. The question was not seriously considered by the Senate Committee. It was considered that Parliament had jurisdiction.

The Merchant Shipping Act of England is, of course, in force in Canada, and applies to British ships trading therewith. That Act deals with the "Liability of Shipowners" in sections 502 to 509 inclusive, and these sections, unless the context otherwise requires, extend to the whole of His Majesty's dominions.<sup>8</sup> They would not apply, however, to Canadian registered vessels, if repealed by a Canadian Act.<sup>9</sup>

Section 2 of the Colonial Laws Validity Act, 1865,<sup>10</sup> provides that, "Any colonial law which is or shall be repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force or effect of such Act, shall be read subject to such Act, order or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."<sup>11</sup>

The Parliament of Canada has power, under the British North America Act, to legislate respecting "Trade and Commerce" and "Navigation and Shipping." Although the power to legislate respecting trade and commerce is limited, it may fairly be said to extend to all matters of trade and commerce, in

8. *Id.*, s. 509.

9. Section 735.

10. 28-29 Vict. Imp., c. 63.

11. Cr. Code, s. 589, as to offences in Canada against Imperial statutes.

connection with any of the matters specifically referred to Parliament, such as navigation and shipping.<sup>12</sup>

From the above, therefore, it may be contended that the Parliament of Canada has jurisdiction in respect to a contract for the carriage of goods by sea from a Canadian port to a port without Canada, in so far as (respecting British ships) its enactments are not repugnant to the provisions of The Merchants Shipping Act, or any other Act of the Imperial Parliament.

From careful reading of sections 502 to 509 inclusive of The Merchants Shipping Act, it will not appear that there is anything in the new Act repugnant to these sections. The effect of section 502 will have further consideration in conjunction with section 7 of the new Act.

5. *Recognition of the Act by courts without Canada.*—Upon the principle that a contract is governed by the law of the place where it is made, provided the intention of the parties thereto to the contrary does not appear, and particularly if the provisions of such law are incorporated in the contract, the English courts would, in suits taken in England, apply the provisions of the Act to bills of lading issued under the Act.<sup>13</sup>

Upon these principles the exceptions and limitations of the Harter Act have been applied by the English courts.<sup>14</sup> There is no reason to doubt that this jurisprudence would be followed in respect to the Canadian Act.

Section 4 will be considered with sections 6 and 7.

6. *Section 5 considered.*—This section enacts that:—

5. Every bill of lading; or similar document of title to goods, relating to the carriage of goods from any place in Canada to any place outside of Canada shall contain a clause to the effect that the shipment is subject to all the terms and provisions of, and all the exemptions from liability contained

12. *Parson's Case* (1881) 7 App. Cas. 796, 51 L.J.C. 11; *Tennant v. Union Bank of Canada*, L.R. (1894) A.C. 31.

13. Carver, *Carriage by Sea*, s. 201 et seq.

14. *McFadden v. Blue Star Line*, 74 L.J.K.B. 423; (1905) 1 K.B. 697; *The Glenochil* (1895) 65 L.J., p. 1 (1896) Prob. 10; *The Rodney* (1900) P. 112, 69 L.J., p. 29.

in, this Act; and any stipulation or agreement purporting to oust or lessen the jurisdiction of any court having jurisdiction at the port of loading in Canada in respect of the bill of lading or document, shall be illegal, null and void, and of no effect.

This section is not to be found in the Harter Act; but it has become the almost universal custom to incorporate the Harter Act in bills of lading for the carriage of goods to and from the United States.

Section 5 only requires that a clause to the effect that "the shipment is subject to all the terms and provisions of and all the exceptions from liability contained in this Act" should be inserted in the bill for the carriage of goods to any place outside of Canada and will, therefore, not apply to Canadian coasting trade. The purpose of incorporating the Act into the contract is, no doubt, to cause foreign courts to apply its provisions.

The second part of section 5, declaring void a stipulation or agreement "to oust or lessen the jurisdiction of any court having jurisdiction at the port of loading in Canada, in respect of a bill of lading or document," is possibly prompted by the clause found in many bills of lading, particularly English bills, giving exclusive jurisdiction to courts without Canada, in respect to any dispute between the interested parties, and, at times, stipulating that all such disputes be determined by British or some foreign law. Our courts have dealt with such clauses, and, apparently, with approval.<sup>15</sup>

On the other hand, the United States courts have refused to recognize such clauses, on the ground that such stipulations are contrary to public policy.<sup>17</sup>

Our section 5 will probably leave to be determined the question as to whether "British law" or "the law of England" or the foreign law invoked, as the case may be, if applied as re-

15. *Rendell v. Black Diamond S.S. Co.*, Q.R. 10 S.C. 257; *Michalson v. Hamburg-American Packet Co.*, Q.R. 25 S.C. 34; *Canada Sugar Refining Co., Limited v. Furness-Withy Co., Limited*, Q.R. 27 S.C. 502; *Ramsey v. Hamburg-American Packet Co.*, Q.R. 17 S.C. 232.

17. *The Silvia* (1898) 171 U.S. 462; *The Chattahoochee* (1899) 173 U.S. 540; *The Etona* (1894) 64 Fed. 880.

quired by the bill of lading, would oust or lessen the jurisdiction of the Canadian courts, in view of the fact that they might, nevertheless, retain jurisdiction respecting the matters at issue, subject to the obligation to apply the English or foreign law.

It is possible that our courts would hold in the affirmative, and would refuse to recognize such a clause, on the grounds of public policy, following the decisions in United States.

The jurisdiction of English or foreign courts is, of course, unaffected.

Before the Senate Committee it was argued that the bill, as originally drafted, would permit of the shipowner being sued at some point of original shipment remote from the actual port of loading, where presumably the Canadian domicile of the shipowner would be; and it was pointed out that the words "at the port of loading," as used in this section, would preclude such a possibility. This is open to doubt, inasmuch as the section does not, in terms, exclude the jurisdiction, otherwise existing, of any such court, any more than it excludes the jurisdiction of any court abroad.

### III. CONTRACTING OUT OF NEGLIGENCE PROHIBITED.

Section 4 of the Act reads as follows:—

4. Where any bill of lading or similar document of title to goods contains any clause, covenant or agreement whereby:—

- (a) the owner, charterer, master or agent of any ship, or the ship itself, is relieved from liability for loss or damage to goods arising from negligence, fault, or failure in the proper loading, stowage, custody, care or delivery of goods received by them or any of them to be carried in or by the ship; or,
- (b) any obligations of the owner or charterer of any ship to exercise due diligence to properly man, equip, and supply the ship, and make and keep the ship seaworthy, and make and keep the ship's hold, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation, are in any wise lessened, weakened or avoided; or,

(c) the obligations of the master, officers, agents, or servants of any ship to carefully handle and stow goods, and to care for, preserve, and properly deliver them, are in any wise lessened, weakened or avoided; such clause, covenant or agreement shall be illegal, null and void, and of no effect, unless such clause, covenant or agreement is in accordance with other provisions of this Act.

1. *Scope of sec. 4.*—The provisions contained in the above section are practically the same as those in secs. 1 and 2 of the Harter Act, with these differences:—

In respect of paragraph (a): The Harter Act reads, after the word "care," "or proper delivery of any and all lawful merchandise or property committed to its or their charge." There is substantially no difference in meaning. Our Act follows the Australian Act.

In respect of paragraph (b): After the words "and supply the ship," the Harter Act reads, "and make said vessel seaworthy and capable of performing her intended voyage."

The provision as to *keeping* the ship seaworthy, and as to making and *keeping* her "hold, refrigerating and cooled chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation," are taken from the Australian Act.

It has, however, been held under the Harter Act, even in the absence of special reference to that Act, that the shipowner was responsible for the break-down of the refrigerator, notwithstanding the bill of lading exception "against such break-down, even though arising from defect existing at or previous to the commencement of the voyage."<sup>18</sup>

In respect of paragraph (c): The Harter Act does not contain the word "preserve," which is also taken from the Australian Act.

Section 4 contains the most important provision of the new Act, in that it makes a radical change in the law heretofore existing in Canada, as laid down by the Supreme Court of

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18. *The Southwark* (1903) 191 U.S. 1.

Canada, in the case of *Glengoil SS. Company & Pilkington*,<sup>19</sup> as follows: "A condition in the bill of lading providing that the shipowner shall not be liable for negligence on the part of the master or mariners, or their own servants or agents, is not contrary to public policy, nor prohibited by law in the Province of Quebec." This judgment further held that art. 1676 of the Civil Code of the Province of Quebec only applied to notices by carriers and not to bills of lading, as the contract between the parties. It would, also, appear from the judgment, that in England and presumably the other provinces of Canada, and in France, Italy, Germany and Belgium, the law, prior to that time, had been to the same effect.<sup>20</sup>

Previous decisions in the Province of Quebec had determined that no person could contract out of the consequences of his own negligence,<sup>21</sup> but *Glengoil & Pilkington* has been followed by the Quebec courts.<sup>22</sup>

Since the Supreme Court decision in *Glengoil & Pilkington*, jurisprudence in France has declared to be void clauses exempting from liability for negligence.<sup>23</sup> This latter jurisprudence is more in accord with the Convention of Berne<sup>24</sup> and the French statute,<sup>25</sup> both of which prohibit or limit exemption of liability for negligence.<sup>26</sup>

Section 4, in declaring certain exceptions void, does not, in terms, impose upon the shipowner and others the obligation to use the care and due diligence, which he cannot relieve himself from.

19. (1898) 28 S.C.R. 146.

20. Id., p. 158.

21. *Rendell v. Black Diamond Steamship Co.*; Q.R. 10 S.C. 257.

22. *Dean v. Furness*, Q.R. 9 Q.B. 81; *Canada Sugar Refining Co. v. Furness-Withy Co., Limited*, Q.R. 27 S.C. 502.

23. (1901) S.P. 1, 401 and note; (1901) D.P. 1, 152; (1903) D.P. 1, 17 and 19 and note.

24. 1st October, 1890.

25. 20 mars 1902.

26. (1903) D.P. 1, 19; *Journal Officiel*, p. 1408.

The common law, however, imposes this obligation, and The Canada Shipping Act gives it statutory form.<sup>27</sup> Carriers would be subject to one or the other.

2. *Insurance*.—A clause frequently met with in bills of lading is to this effect: "The shipowner is not to be liable for any damage to any goods, which is capable of being covered by insurance."

The courts have shewn a decided disposition not to give effect to this clause, if there was any way to avoid doing so. It would undoubtedly be void under sec. 4.

#### IV. EXEMPTIONS OF LIABILITY IN FAVOUR OF THE SHIOPOWNER.

This is dealt with in section 6.

6. If the owner of any ship transporting merchandise or property from any port in Canada exercises due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, neither the ship nor the owner, agent or charterer shall become or be held responsible for loss or damage resulting from faults or errors in navigation or in the management of the ship, or from latent defect.

1. "*Due diligence*."—The above section is the first part of sec. 3 of the Harter Act, with the most important addition of the words "or from latent defect."

This section is a modification of the common law rule and, in broad general terms, with section 7, covers the exceptions usually included in the bill of lading, except that as to negligence. Almost every one of the expressions contained in these two sections has received judicial interpretation.

"Due diligence" denotes, in the first place, all absence of negligence. Moreover, it "requires a carefulness of inspection or repair proportionate to the danger."<sup>28</sup>

"It seems to be equivalent to reasonable diligence, having regard to the circumstances known, or fairly to be expected,

27. Section 963.

28. *The Edward L. Morrison* (1894) 153 U.S. 199.

and to the nature of the voyage, and the cargo to be carried. It will suffice to satisfy the condition if such diligence has been exercised down to the sailing from the loading port.<sup>29</sup> But the fitness of the ship at that time must be considered with reference to the cargo,<sup>30</sup> and to the intended course of the voyage; and the burden is upon the shipowner to establish that there has been diligence to make her fit.<sup>31</sup> The actual exercise of such diligence by the owner or his agents is a condition precedent to his claiming the protection of the statute, and he cannot rely on the *prima facie* presumption of law that his ship is seaworthy.<sup>32</sup>

It is not enough to satisfy the condition that the shipowner has been personally diligent, as by employing competent men to do the work. The condition requires that diligence to make her fit shall, in fact, have been exercised, by the shipowner himself, or by those whom he employs for the purpose.<sup>33</sup> The shipowner is responsible for any shortcomings of his agents or subordinates in making the steamer seaworthy at the commencement of the voyage for the transportation of the particular cargo.<sup>34</sup>

2. "*To make the ships seaworthy and properly manned, equipped and supplied.*"—The English and United States law is that the obligation of the owner, as to seaworthiness, is satisfied, if the ship be seaworthy before the inception of the voyage and until it has actually commenced.<sup>35</sup> Even the Australian

29. *The Guadaloupe* (1899) 92 Fed. Rep. 670; *The Cygnet* (1904) 126 Fed. Rep. 742.

31. *The Southwark* (1903) 191 U.S. 1; *The Alvena* (1896) 74 Fed. Rep. 252, 79 Fed. Rep. 973.

32. *The Southwark* (1903) 191 U.S. 1.

33. *The Wildcroft* (1905) 201 U.S. 378. Cf. *The Ninfa* (1907) 156 Fed. Rep. 512.

34. *Dobell v. Steamship Roessmore Co.*, 64 L.J.Q.B. 777, (1895) 2 Q.B. 408; *The Flamborough* (1895) 69 Fed. Rep. 470; *The Mary L. Peters* (1897) 68 Fed. Rep. 919, 79 Fed. Rep. 998; *The Colima* (1897) 82 Fed. Rep. 665; *International Nav. Co. v. Farr* (1901) 181 U.S. 218.

35. *The Frey* (1899) 92 Fed. Rep. 667, at p. 669; *Putnam v. Manitoba* (1900) 104 Fed. Rep. 145; Carver, p. 149.

36. Carver, sec. 17 et seq.; *The Silvia* (1898) 171 U.S. 462; *The Germanic* (1903) 124 Fed. 1; *The Caledonia* (1895) 157 U.S. 124.

Act goes no further, as the warranty it implies is, as to seaworthiness "at the beginning of the voyage."<sup>37</sup>

Section 6 of the new Act would appear to follow the law elsewhere in this respect; but its fourth section prohibits any limitation of negligence to "make and *keep* the ship seaworthy." The word "keep" was first used in this connection in the Australian Act, but its effect was there nullified by the phrase in a subsequent section "at the beginning of the voyage."

The courts may at some time be called upon to determine whether sec. 4 must be read with and affects sec. 6 in this respect, so as to impose on the shipowner the necessity of using due diligence to keep his ship seaworthy after the commencement of the voyage. It is, however, unlikely that serious question can arise in this respect, in view of the other terms of the Act, as it is difficult to conceive of a ship becoming unseaworthy from any other cause than from failure to exercise due diligence before the commencement of the voyage, or each stage of the voyage, and for this failure the shipowner would be responsible, or from faults or errors in navigation, or in the management of the ship, or latent defect, from the results of which he is exempt.

The test of seaworthiness commonly applied by both the English and American courts is whether the vessel is reasonably fit in design, structure, condition and equipment to carry the goods, which she undertakes to transport, and to encounter the ordinary perils of the voyage. The ship must also have a competent master and a competent and sufficient crew.<sup>38</sup>

There is such a mass of jurisprudence on this subject that it is only possible to give a few examples. In *The Rossmore*,<sup>39</sup> an English case under the Harter Act, a cargo port had been carelessly closed by the ship's carpenter before the vessel sailed. During the voyage, part of the cargo was damaged by sea-water entering through this port, which could not be reached and

37. Section 8.

38. Carver, sec. 18; *The Silvia* (1898) 171 U.S. 462.

39. (1895) 2 Q.B. 408.

closed on account of freight being stowed against it. It was held that the ship was unseaworthy at the time of sailing.<sup>40</sup>

Due diligence to make the ship seaworthy imposes an obligation on the shipowner to exercise due diligence as to the condition and working of the refrigerating machinery, prior to the commencement of the voyage.<sup>41</sup>

It is of interest to note that the act of sending or taking unseaworthy ships to sea is a crime under Cr. Code secs. 288 and 289.

3. "*Faults or errors in navigation or in the management of the ship.*"—"It has been repeatedly held that the word 'management' does not include acts of preparing the ship for a voyage. Thus, omission in the ship's equipment, negligence or mistake in the stowage, or so loading her that she will get out of safe trim on the voyage, are not faults in 'management.' Even if such defaults could be described as faults or errors in management, they would, if they occurred at the commencement of the voyage, negative the condition of due diligence in making the ship fit, and so would exclude its exemption. Where the act negligently done or omitted has been one which was or ought to have been done during the course of the voyage, and had reference to the safety of the ship, whether regarded as a navigating vessel or as a cargo carrier, it has generally been a fault in navigation or management."<sup>42</sup>

The remarks of Sir F. Jeune, in *The Glenochil*,<sup>43</sup> in comparing secs. 1 and 3 of the Harter Act (our secs. 4 and 6) are of sufficient interest to quotation:—

"The bill of lading in this case incorporates, by words added to it, what is known as the Harter Act—'the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th of

40. Also *International Navigation Co. v. Farr* (1901) 181 U.S. 218.

41. *The Southwark* (1903) 191 U.S. 1; *The Maori King* (1895) 22 B. 550.

42. Carver, sec. 103 (e), cases cited and examples given.

43. (1895) 65 P. 1.

February, 1893.' The question is whether the exemptions in that Act apply to the present case so as to give rise to an exemption from what the learned judge has found, and rightly found, to be negligence. . . . It is not at first sight, I think, very easy to understand the meaning of the Harter Act and to reconcile clause 1 and clause 3. . . . No doubt the object of clause 1 is in terms to prevent conditions being inserted in the bill of lading which would exempt from liability in respect of want of proper care of the cargo. It is obvious, of course, that those words cannot be taken in their largest sense, because in a certain sense any mismanagement of the ship, in navigation or otherwise, is want of care as regards the cargo, secondarily, though not primarily. But it is clear what was intended by the words of section 3—words which exempt from liability for damage or loss resulting from faults and errors of navigation or in the management of the vessel; and the way in which those two provisions may be reconciled is, I think—first, that it prevents exemptions in the case of direct want of care in respect of the cargo; and, secondly, the exemption meant is, though in a certain sense there may be want of care in respect of the cargo, primarily a fault arising in the navigation or in the management of the vessel, and not of the cargo. Now, then, is this a fault in the management of the vessel within the meaning of the bill of lading? It is not necessary to deal with it as a question of navigation. It is sufficient to deal with it as a question of management. It is said, however, that the two things are one and the same, and that management and navigation mean the same thing because the management is only in the navigation, and no doubt upon that a most formidable argument arises. . . . It seems to me almost clear that management goes somewhat beyond—perhaps not much beyond—navigation, and takes in this very class of things, which do not affect the sailing or movement of the vessel, but do affect the vessel herself . . . and I adhere to what I said then, that stowage is an altogether different matter from the management of the vessel, because it is connected with the cargo alone, and the management of the vessel is something else. It may be that the illustration I gave in that case was not a very happy one; but the distinction I intended to draw then, and intend to draw now, is one between want of care of cargo, and want of care of vessel indirectly affecting cargo. Then the other argument which was pressed upon us was that the terms 'management' and 'navigation'

under the provisions of the Harter Act (1) apply only to the period of navigation itself; and that is said to end when the vessel comes into dock. . . . I do not say whether navigation in the strict sense of the term is limited to the period that the vessel is sailing—that is to say, in motion—but I confess I see no reason whatever for limiting the word ‘management’ to the period of the vessel being actually at sea.”

4. “*Latent defect.*”—Under the Harter Act it has been held, in effect, that a latent defect is one which could not have been discovered by inspection.<sup>44</sup>

Under the law of England a warranty of seaworthiness, at the beginning of the voyage, is implied;<sup>45</sup> and stipulations excluding this warranty are strictly construed.<sup>46</sup>

In fact, the Australian Act, sec. 8, expressly provides that, “In every bill of lading with respect to goods, a warranty shall be implied that the ship be, at the beginning of the voyage, seaworthy in all respects and properly manned, equipped and supplied.”

It has been held in England that, even under the Harter Act, an express stipulation excluding warranty of seaworthiness was essential to relieve the shipowner from liability for latent defects, such warranty being otherwise always presumed;<sup>47</sup> and this might, also, be inferred from decisions of the United States Supreme Court.<sup>48</sup>

It has, however, also been held in the United States that “the main purposes of the Act were to relieve the shipowners from liability for latent defects, not discoverable by the utmost care and diligence.”<sup>49</sup>

It would, therefore, appear that this statutory exemption from the results of “latent defects” is a gain for the ship-owner.

44. *The Manitoba*, 104 Fed. Rep. 151; *The Phœnicia*, 90 Fed. Rep. 118; *The Carib Prince*, 170 U.S. 655.

45. Carver, sec. 17, seq.

46. Carver, sec. 79, seq.

47. *McFadden v. Blue Star Line* 74 L.J.K.B. 423; (1905) 1 K.B. 697 and 707.

48. *The Caledonia* (1895) 157 U.S. 124; *The Carib Prince* (1898) 170 U.S. 655.

49. *The Irrawaddy* (1898) 171 U.S. 187, 192.

5. "*Fire, dangers of the sea, etc.*"—These exceptions are dealt with in the following section:—

7. The ship, the owner, charterer, agent or master shall not be held liable for loss arising from fire, dangers of the sea or other navigable waters, acts of God or public enemies, or inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service, or other reasonable deviation, or from strikes, or for loss arising without their actual fault or privity or without the fault or neglect of their agents, servants or employees.

This section forms the latter part of sec. 3 of the Harter Act, and the exemptions contained in sec. 7 are, in the Harter Act, made conditional upon the exercise of due diligence, as expressed in the first part of the section, which forms our sec. 6.

According to the terms of sec. 7, it would appear that the shipowner is exempted from liability for the result of the events mentioned, down to the word "strikes," whether or not, in respect to those to which human negligence could contribute, such as fire, for example, they have resulted from his fault or privity; and it would appear from the debate before the Senate Committee that the intention was to exonerate the shipowner from loss by fire, even when his negligence or that of his servants contributed to it. The courts will, no doubt, be called upon to determine in how far the section has this desired effect.

In this connection the following facts are of interest:—

The former Canadian Act respecting the Liability of Carriers by Water,<sup>50</sup> exempted shipowners from liability from fire and dangers of navigation or other causes of loss therein mentioned, "happening without their actual fault or privity." The revisers of the statutes of 1906 drafted sec. 964 of The Shipping Act,<sup>51</sup> to represent the above, in the following manner:—

50. R.S.C. of 1886, c. 82, s. 2, par. 4.

51. R.S.C., c. 113, ss. 961 to 966.

"964. Carriers by water shall be liable for the loss of or damage to goods entrusted to them for conveyance, except that they shall not be liable when such loss or damage happens:—

- (a) without their actual fault or privity, or without the fault or neglect of their agents, servants or employees; or,
- (b) by reason of fire or the dangers of navigation; or,
- (c) from any defect in or from the nature of the goods themselves; or,
- (d) from armed robbery or other irresistible force. R.S., c. 82, s. 2."

It might be contended that the result of the revision was to exempt the shipowner from loss by fire, even though it resulted from his actual fault or privity, in view of the apparent deliberate transposition of the parts of the old law.

The old Canadian statute was in accord with The Merchants Shipping Act, sec. 502, which, of course, is still operative. By that section, the shipowner is only discharged from loss by fire, etc., "happening without his actual fault or privity." Therefore, in respect to sec. 7 of the new Act, and, more particularly, in regard to British ships, while we have the new Act in terms exempting shipowners from liability for fire, without exception as to its happening as a result of his actual fault or privity, we find the governing Imperial Act limiting the exemption from liability in that respect. The probability is that sec. 7, in respect to British ships, would be construed in accordance with the terms of The Merchants Shipping Act.

The question may be a little more difficult of solution in respect to the owners of Canadian registered and foreign ships.

In respect to them there would appear to be, for our courts, a bald and unconditional exemption from liability for all the causes mentioned. However, sec. 4 and the last clause of sec. 7 would probably bring about the adoption, under the new Act, of the principle laid down in both England and the United States, under the somewhat more formal legislation in those countries, that the shipowner will not be allowed to rely upon exceptions, when his own negligence or the negligence of his servants has brought the excepted cause of loss into operation, unless, of

course, in the case of the Harter or the Canadian Act, the negligence of the servants consist of faults or errors in navigation or relate to the management of the ship.<sup>52</sup>

Presumably the exceptions of fire, dangers of the sea, acts of God, or public enemies, inherent defect, etc., in the thing carried, will be read as similar exceptions in bills of lading have been read, and it is therefore unnecessary to deal with them.

The words "or other reasonable deviation or from strikes, or from loss arising without their actual fault or privity, or without the fault or neglect of their agents, servants or employees" are not found in the Harter Act.

The phrase "or other reasonable deviation" was probably suggested by some United States jurisprudence under the Harter Act, somewhat strictly interpreting the exemption from loss from deviation in rendering the service mentioned.<sup>53</sup>

The term "strikes" would probably not include lockouts, but it is not of moment whether it would or not, inasmuch as if the lockout was not due to the actual fault or privity of the shipowners, their agents, servants or employees, the shipowner would not be responsible under sec. 7, and if the lockout was due to such fault or privity, liability could not be stipulated against.

The clause "and for loss arising without their actual fault or privity, or without the fault or neglect of their agents, servants or employees" is an absolutely general clause, which, coupled with the prohibition to contract out of negligence, should bring about the adoption of what is known as a clean bill of lading.

6. *Declaration of value.*—Sec. 8.—This section reads:—

8. The ship, the owner, charterer, master or agent shall not be liable for loss or damage to or in connection with goods for a greater amount than one hundred dollars per package, unless a higher value is stated in the bill of lading or other

52. Carver, secs. 8, 17; *The Caledonia* (1895) U.S. 124.

53. *Re Mayer; The Emily* (1896) 74 Fed. Rep. 881; *The Chinese Prince* (1894) 61 Fed. 697; *The Florence* (1895) 65 Fed. 248.

shipping document, nor for any loss or damage whatever if the nature or value of such goods has been falsely stated by the shipper, unless such false statement has been made by inadvertence or error. The declaration by the shipper as to the nature and value of the goods shall not be considered as binding or conclusive on the ship, her owner, charterer, master or agent.

This section is not found in the Harter Act, it supersedes sec. 965 of The Canada Shipping Act, but must be read in conjunction with sec. 502, par. 2(ii), of The Merchants Shipping Act. The latter reads as follows:—

“502. The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely,—

\* \* \* \* \*

(ii) (s) Where any gold, silver, diamonds, watches, jewels, or precious stones taken in or put on board his ship, the true nature and value of which have not at the time of shipment been declared (<sup>t</sup>) by the owner or shipper thereof to the owner or master of the ship in the bills of lading or otherwise in writing, are lost or damaged by reason of any robbery, embezzlement, making away with, or secreting thereof.”

The last sentence of section 8, as to the declaration of the owner of a British ship from liability in respect of the valuable articles mentioned, under the circumstances stated, he would not be liable for even the sum of \$100 per package, in respect to them under sec. 8.

The last sentence of section 8, as to the declaration of the shipper not being binding on the ship, does not go quite as far as it might, in order to complete the intention. For instance, the terms “quantity, weight, marks, etc., ” might have been added.

#### V. OBLIGATION TO ISSUE BILL OF LADING.—SEC. 9.

This section is as follows:—

**9.** Every owner, charterer, master or agent of any ship carrying goods, shall on demand issue to the shipper of such goods a bill of lading shewing, among other things, the marks

necessary for identification as furnished in writing by the shipper, the number of packages or pieces, or the quantity or the weight, as the case may be, and the apparent order and condition of the goods as delivered to or received by such owner, charterer, master or agent; and such bill of lading shall be *prima facie* evidence of the receipt of the goods as therein described.

This is substantially the same as the Harter Act, the words "or pieces" were added to satisfy the lumber trade.

#### VI. DELIVERY IN CASE OF WOOD GOODS.—SEC. 10.

This is provided for by the following section:—

**10.** In case of wood goods, notwithstanding anything in the charter party, bill of lading, or other shipping document, the owner, charterer, master, or agent of the ship, or the ship itself, shall only be bound to deliver to the consignee, the pieces received from the shipper, and shall not be held responsible for deficiency in measurement; and any words inserted in any charter party, bill of lading or other shipping document for the purpose of making the owner, charterer, master or agent of the ship, or the ship itself, liable for deficiency in measurement in such case shall be illegal, null and void and of no effect.

This section was inserted at the request of the steamship owners, ostensibly for the purpose of avoiding complications resulting from difficulty in tallying lumber by measure and by marks.

#### VII. NOTICE OF ARRIVAL OF SHIP.—SEC. 11.

This is provided for as follows:—

**11.** When a ship arrives at a port where goods carried by the ship are to be delivered, the owner, charterer, master or agent of the ship shall forthwith give such notice as is customary at the port, to the consignees of goods to be delivered there, that the ship has arrived.

This section is not found in the Harter Act. It creates no new obligation, inasmuch as the notice required is such as is

customary at the port of discharge, which custom probably has hitherto been complied with.

### VIII. OFFENCES.—SEC. 12.

This section reads as follows:—

**12.** Every one who, being the owner, charterer, master or agent of a ship,—

(a) inserts in any bill of lading or similar document of title to goods any clause, covenant or agreement declared by this Act to be illegal; or makes, signs, or executes any bill of lading or similar document of title to goods containing any clause, covenant or agreement declared by this Act to be illegal;

without incorporating verbatim, in conspicuous type, in the same bill of lading or similar document of title to goods, section 4 of this Act; or,

(b) refuses to issue to a shipper of goods a bill of lading as provided by this Act; or,

(c) refuses or neglects to give the notice of arrival of the ship required by this Act;

is liable to a fine not exceeding one thousand dollars, with cost of prosecution; and the ship may be libelled therefor in any Admiralty District in Canada within which the ship is found.

2. Such proportion of any penalty imposed under this section as the court deems proper, together with full costs, shall be paid to the person injured, and the balance shall belong to His Majesty for the public uses of Canada.

Paragraphs (a) and (c) are not found in the Harter Act, which also imposes a penalty of \$2000. The penalty clause otherwise is practically the same.

A question might arise as to how far a prosecution would lie in Canada, under paragraph (c), for an offence which must, in its nature, occur without Canada, in respect to all carriage, other than the Canadian coasting trade.

There has apparently been only one prosecution for penalties under the Harter Act, and that was unsuccessful.<sup>64</sup>

54. U.S. v. Cobb (1906) 163 Fed. 791.

**IX. DANGEROUS GOODS.—SECS. 13, 14.**

These sections are as follows:—

**13.** Every one who knowingly ships goods of an inflammable or explosive nature, or of a dangerous nature, without before shipping the goods making full disclosure in writing of their nature to, and obtaining the permission in writing of, the agent, master or person in charge of the ship, is liable to a fine of one thousand dollars.

**14.** Goods of an inflammable or explosive nature, or of a dangerous nature, shipped without such permission from the agent, master or person in charge of the ship, may, at any time before delivery, be destroyed or rendered innocuous, by the master or person in charge of the ship, without compensation to the owner, shipper or consignee of the goods; and the person so shipping the goods shall be liable for all damages directly or indirectly arising out of such shipment.

These sections are not found in the Harter Act, but they really add nothing new of importance to the common law.

The remaining sections are:—

**15.** This Act shall not apply to any bill of lading or similar document of title to goods made pursuant to a contract entered into before this Act comes into force.

**16.** This Act shall come into force on the first day of September, one thousand nine hundred and ten.

**X. ONUS OF PROOF.**

It has recently been settled in the United States that the onus of proof is upon the vessel owner to show that the damage was from one of the causes from which the vessel is exempted under the Harter Act.<sup>55</sup> The reason given for this view is practically the same as that given for requiring express clauses in bills of lading, namely, that both the bill and the Act must be strictly construed, because the cargo owner is not on the same footing

55. *Jahn v. Folmina* (1909) 212 U.S. 354, 29 Sup. Ct. 363.

with the vessel owner to inspect or learn of the vessel's condition or the causes of damage. He must either accept the terms offered by the carrier or not ship the goods.

In England and Canada the general rule of evidence would appear to be similar, but with some modifications.<sup>56</sup>

*Query.*—How far would a clause be upheld, which stipulated that the onus of proof would, in all cases, be upon the plaintiff, seeking a condemnation against the shipowner, under a bill of lading? Would such a clause be contrary to public policy, or not?

I have not been able to find any jurisprudence to the effect that it would be contrary to public policy; but, on the contrary, I find that the French courts, when they have refused to exonerate the shipowner under a clause contracting out of his negligence and that of his servants, have held that the clause had, at least, the effect of shifting the onus of proof on to the cargo owner.<sup>57</sup>

#### XI. PRIORITY OF LIEN.

There seems to be only one case so far decided in the United States, under the Harter Act, wherein priority of lien, as between the vessel owner and the cargo owner, has been considered. It was there held that the cargo owner had the prior lien, upon the ground that the negligence of the officers of the vessel contributed to cause the loss and that both they and the shipowner were prevented, thereby, from recovering with or before the cargo owner.<sup>58</sup> In other words, although the shipowner might not be responsible for the fault of the officers in the management of the ship, so as to make him liable for the loss of the goods; he, nevertheless, was responsible for the acts of his servants to the extent of giving to the cargo owner a prior lien upon

56. Carver, sec. 78; *Dominion Express Company v. Rutenberg*, Q.R. 18 K.B. 50.

57. Sirey, C.N. 1784, No. 10; Sirey Rec. (1901) 1, 401, note; Dalloz, P. Tables, 1897-1907, Vo. Commissionnaire de Transport, Nos. 68 and 69.

58. *In re Lakeland Trans. Co.* (1900) 103 Fed. 328, affirmed, 111 Fed. 601.

a fund insufficient to meet the claims of both. Presumably, therefore, in the absence of fault or privity on his part, and of negligence on the part of his servants, he would rank equally with the cargo owner.

### XIII. EFFECT ON GENERAL AVERAGE CONTRIBUTION.

1. *Shipowner v. Cargo owner*.—It has been settled by the Supreme Court of the United States in *The Irrawaddy* that, while the Harter Act declared the vessel owner not to be responsible for the negligence of his servants in the navigation or management of the vessel, he could not recover from the cargo owner any contribution in general average for his own losses, caused by negligence of his servants, as stated.<sup>59</sup> In other words, while the Act so relieved the vessel owner from liability, it gave him no affirmative relief against the cargo for the results of such negligence, because, "had Congress intended to grant the further privilege now contended for, it would have expressed such intention in unmistakable terms."

In England, different views on the subject prevail, and the decision in *The Irrawaddy* has not been followed.

In England, as is pointed out in Carver,<sup>60</sup> the fault which takes away the right to contribution must be one which gives the right of action to the person, who might otherwise be liable to contribute, either as being a tort, or as a breach of contract; so that if unseaworthiness or negligent navigation are, by contract of carriage, not to be counted as faults against the ship-owner, his right to contribution cannot be lost, on the ground that unseaworthiness or bad navigation made the sacrifice necessary. The view adopted by the English courts is that the default or wrongful act, which is to bar a person from claiming contribution, "must be something which is wrongful in the eyes of the law, that is to say, something which constitutes an actionable act."<sup>61</sup>

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59. *The Irrawaddy* (1898) 171 U.S. 187, 192.

60. Section 373 (b).

61. *Kennedy, L.J.*, in *Greenshields, Cowie & Co.* (1908) 1 K.B., p. 51.

*The Carron Park* is the leading English case.<sup>62</sup> In that case Sir J. Hannen said: "The claim for contribution as general average cannot be maintained, where it arises out of any negligence for which the shipowner is responsible; but negligence for which he is not responsible is as foreign to him as to the person who has suffered it." Lord Justice Vaughan Williams, however, apparently held a contrary view, namely, that the exceptions in the contract of carriage do not affect liability to contribute in general average.<sup>63</sup> But a majority of the Court of Appeals, in that case, confirmed the principle laid down in *The Carron Park*.

Will the Canadian courts hold that, although the shipowner, under the new Act, is not responsible for the faults of his servants in the navigation and management of the ship, the negligence of his servants, nevertheless, defeats his recourse in general average against the cargo owner, following the United States jurisprudence; or will they hold that, as the shipowner is not responsible under the contract for such negligence, it is therefore non-existent for him, and cannot affect his recourse in general average, following the English jurisprudence?

In the United States, a motive for the *Irrawaddy* decision was that the Harter Act involved a change of law and could not be extended beyond its express terms. If the Canadian law, prior to the new Act, be held to have been the English law, it is possible the English rule will be followed.

2. *Cargo owner v. Shipowner*.—In two cases in the United States, subsequent to the decision of the Supreme Court in *The Irrawaddy*, the right of the cargo owner to sue the shipowner for general average contribution was considered.

In *The Strathdon*,<sup>64</sup> it was held, in effect, that the cargo owners possessed such recourse, but that the vessel owner could

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62. *The Carron Park* (1890) 59 L.J. Adm. 74; 15 P.D. 203.

63. See his dissenting judgment in *Milburn v. Jamaica* (1900) 2 Q.B. 540, pp. 548-553.

64. *The Strathdon* (1899) 101 Fed. 600.

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set up against it, by way of compensation or off-set, the damage caused to the ship, when that damage was caused in a manner for which the shipowner was not responsible under the Act. The court was of opinion that the cargo owner should not be allowed to recover from the shipowner in general average, under the circumstances, without such off-set, because, by changing the form of action in this respect, he could recover for losses for which the vessel owner was not responsible under the Act. The court said: "When the cargo owner seeks to recover in general average, in such case the shipowner is also entitled to contribution as though innocent of fault; otherwise the cargo owner would recover by selecting his form of procedure for losses for which the shipowner was not responsible."

In *The Jason*,<sup>65</sup> the court held that the cargo owners were entitled to recover, but that the amount paid to the salvors by the vessel owner must be taken into consideration. The court allowed the cargo owners to recover in general average because this was a right existing since the earliest maritime usages had been established, and was, in no way, connected with the rights under the bill of lading, and hence not affected by the Harter Act.

These two cases agree in allowing the vessel owner to set up his loss, occasioned by the negligence of his servants, without his privity or knowledge, against claims for average contribution; but they raise and disagree as to the question whether or not the cargo owner can recover in general average for his losses from a shipowner, who has himself suffered no damage.

Under our law, the liability of the shipowner to the cargo owner in general average would hardly be questioned.

The new Canadian Act specifically states that the shipowner shall not be liable, or held responsible, for loss in the instances and under the conditions stated. Would an action, therefore, in general average, by the cargo owner against the shipowner, be maintained, either in Canada or in England, under circu

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65. *The Jason* (1908) 162 Fed. 56.

stances in which the Act, as part of the bill, or otherwise, provided that the shipowner should not be held liable for loss or damage; and, if maintained, would the shipowner be entitled to off-set his loss against it?

The English courts recognize the bill of lading exceptions to the extent of making negligence, for which the shipowner is not responsible thereunder, "as foreign to him as to the person who has suffered by it." They further give full weight to a contract to enable the shipowner to recover in general average, notwithstanding that the loss may have been brought about by the negligence of himself or his servants, provided it is excepted. It might consequently be consistent for the English courts likewise to declare that the stipulations exempting the shipowner from liability for loss, included, by implication, exemption from general average contribution.

But, while the general average contribution may be affected by contract, it is a matter of maritime law, and not a matter of contract; and an exception, exempting the shipowner from contribution in general average, except, perhaps, in respect to the jettison of deck loads of cattle, would be unusual, as depriving the shipowner of an ancient and well understood right.<sup>66</sup>

It is possible, therefore, that the ordinary stipulations in a bill of lading, exempting from loss without express mention of general average, would be held by the English courts not to include the latter by implication, upon the ground that the exemption from contribution in general average by the shipowner, must be clearly expressed.<sup>67</sup>

It is further possible, therefore, that the English courts and our Canadian courts would apply the same principles to the new Canadian Act and hold "that loss and damage" does not include contribution to general average; and that, where the new Act exempts the shipowner from liability for loss and damage, he is not thereby excused from general average contribution.

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66. Stephens, Bills of Lading, p. 17.

67. *Schmidt & Royal Mail Steamship Co.* (1876) 45 L.J.Q.B. 646; *Crooks v. Allan* (1879) 5 Q.B.D. 38, 40.

It is further possible that English and Canadian courts would refuse to follow the above United States decisions, but the questions involved are not without difficulty and their solution will be awaited with interest.

The factor which might affect this question is that, in the United States, the innocent cargo owner may, in the event of collision, in which both ships are at fault, recover his full loss from either ship, the ship condemned recovering its proportion from the other.<sup>68</sup> Hence, should a cargo owner's recourse against the contracting ship be defeated by the latter's off-set, as permitted under the United States rule, the United States courts may have taken into consideration the fact that the cargo owner should nevertheless possess his recourse for the full amount against the owner of the other ship at fault, for its share.

On the other hand, the English rule is that, when both ships are at fault, the cargo owner can recover from the stranger ship or those responsible for her management, only one-half of the damage caused to the goods.<sup>69</sup>

If, therefore, the United States rule be applied in Canada, in respect to the shipowner's off-set against the cargo owner's claim for general average contribution and the English rule be applied to the effect that a cargo owner can only recover one-half his loss from the stranger ship, the cargo owner, under a Canadian bill of lading, would be in the position of having his recourse against the contract shipowner defeated by the off-set of the latter and his recourse against the stranger ship limited to only one-half of his claim.

### XIII. SUMMARY.

1. *Application and scope of Act*—The Act applies to all articles capable of carriage except live stock, and to all ships carrying goods from a Canadian port. The Merchant Shipping Act must be applied to British ships, not registered in Canada,

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68. *The North Star* (1882) 106 U.S. 17; *The Manitoba* (1895) 122 U.S. 97.

69. Carver, sec. 704.

in respect of liability for loss of damage to goods, when it conflicts with the new Act. The conflict is slight.

It is probable that the Act would be held to be *intra vires* of the Canadian Parliament, and that it would be recognized by courts without Canada, as forming part of the contract of carriage. The foreign law would possibly be applied only in so far as it was consistent with the terms of the Act.

2. *Contracting out of negligence*.—Contracting out of negligence is no longer lawful in Canada, in respect to the water-carriage of goods, and to do so involves a penalty.

3. *Exemptions of liability in favour of the shipowner*.—The Act materially improves the position of the shipowner in giving statutory approval of exemptions of liability, which it has heretofore been necessary to ensure by elaborate bill of lading clauses. The more important among these statutory exemptions are as to "faults or errors in navigation or in the management of the ship, or from latent defect," and generally as to all "loss arising without their (shipowners) actual fault or privity or without the fault or neglect of their agents, servants or employees."

Probably, but not with certainty, the shipowner will not be allowed to rely upon the exemptions contained in section 7, notwithstanding its absolute terms, where his own negligence or the negligence of his servants has brought the excepted cause of loss (*e.g.*, fire) into operation, unless the negligence of the servants consist of faults or errors in navigation or relate to the management of the ship.

4. *Onus of proof*.—The onus of proof would, by law, be upon the ship to prove that the loss fell within one of the exemptions in its favour; but a clause whereby the onus was placed on the cargo owner would, apparently, be valid. This, however, remains to be settled.

5. *Priority of lien*.—It has yet to be settled whether the cargo owner would have a prior lien over the shipowner on a fund

insufficient for both, when the loss has resulted from the negligence of the shipowner's servants, for which he is not responsible under the Act.

6. *General average*.—Several questions arise as to the respective rights and obligations of shipowner and cargo owner of a more or less complicated character, which also await decision.

7. *Conclusion*.—On the whole, it would appear that the new legislation will be beneficial to Canadian trade; and, while opposed and severely criticized by shipowners, it may prove ultimately of benefit to them.

I have endeavoured, in the foregoing memorandum, to limit its matter to new questions, which may arise under the new Act; and, in doing so, I have sought to make it of some service to shipowners, shippers, and possibly to the legal profession.

PEERS DAVIDSON,

(*Of the Bar of the Province of Quebec*).

Montreal.

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The *Law Times* (Eng.) copies in full the article which appeared in our issue of May 2nd, discussing *Mercier v. Campbell* which turned upon the construction of the Statute of Frauds (see ante p. 273). After setting forth the facts and summarizing the arguments our contemporary speaks as follows:

"The decision is one which seems to be in accordance with one already on the Canadian Law Reports (*Canadian Bank of Commerce v. Perran*, 31 O.W.R. 116), and it seems to mark a departure from a long line of American cases. It would appear as though some confusion has arisen in these latter cases through a lack of distinction between the words 'void' and 'voidable,' but the American decisions seem somewhat variable. The case brought to our notice in the *Canada Law Journal* seems to have abundant support in English decisions, but we rather gather that it marks a departure from the accepted law obtaining in Canada. It would seem as though the Canadian decisions

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had been influenced by the current, albeit a variable current, of American opinion. We should be glad to see any doubts as to the validity of such alternative agreements solved on similar lines in the case of all English-speaking communities, for the Statute of Frauds is one of those measures which seems essential to their well-being in all matters coming within its scope."

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Such fees as the following would make the professional mouth water in this country. Mr. Samuel Untermeyer, a leader of the Bar in New York, recently received a fee of \$775,000 as compensation for three or four years' work in bringing about a merger of the Utah Copper Company and the Boston Consolidated Mining Company. The directors and stockholders of both companies unanimously voted that the above sum was not too much to pay and it was upheld by the judges on an attempt to tax it. Our contemporary (*Case and Comment*) says: "In view of the fact that the merger will probably involve a capitalization of \$100,000,000 the fee is really modest. It amounts to less than one per cent. Lawyers in accident cases against corporations on the contingent fee basis usually ask fifty per cent. of the damages recovered."

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On a former page (*ante*, p. 43) we referred to the disparaging judicial remarks which had been used in reference to the case of *Mykel v. Doyle*, 45 U.C.R. 65, which decided that the ten years' limitation does not apply to actions to recover easements, and suggested that in an appellate court that case might possibly receive its quietus by being "overruled"; but this contingency has not happened, instead of its obsequies having been performed it has been formally and fully resuscitated by the Court of Appeal and is now indubitable law in Ontario as far as that court can make it so. See *Ihde v. Starr*, 21 O.L.R. 407, where it was followed, and declared by Garrow, J., to have been too long followed to be questioned in any court in Ontario.

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**REVIEW OF CURRENT ENGLISH CASES.**(Registered in accordance with the Copyright Act.)

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**POWER OF APPOINTMENT—TESTAMENTARY POWER—COVENANT BY DONOR OF POWER WITH OBJECT OF POWER NOT TO EXERCISE APPOINTMENT SO THAT THE COVANTEE WILL GET LESS THAN SPECIFIED SUM—APPOINTMENT CONTRARY TO COVENANT.**

*In re Evered, Molineux v. Evered* (1910) 2 Ch. 147, which deals with a point in the law of powers, may be briefly noticed. The donee of a power of appointment by will, covenanted with an object of the power not to exercise the power so that he would get less than a specified sum. The donee of the power died, leaving a will appointing the fund in question so that the covenantee would get less than the sum specified in the covenant; and it was held by the Court of Appeal that though the covenant could not be treated as an appointment, because that would be permitting a testamentary power to be executed by deed, yet that effect might be given to the covenant by treating it as a contract to leave the fund unappointed so far as might be necessary to give effect to the covenant; and that the appointment made by the will was therefore nugatory to the extent necessary to give the covenantee the specified sum as in default of appointment.

**POWER OF APPOINTMENT—POWER OF REVOCATION—APPOINTMENT OF PART OF TRUST ESTATE—SUBSEQUENT APPOINTMENT OF TRUST ESTATE IN GENERAL TERMS—IMPLIED REVOCATION—ABSENCE OF WORDS OF INHERITANCE IN APPOINTMENT.**

*In re Thursby, Grant v. Littledale* (1910) 2 Ch. 181. This is another decision on the law of powers. In this case by marriage settlement a husband and wife had a joint power to appoint the trust funds and securities comprised in the settlement, amongst their children and issue; and the settlement contained a power to invest the trust funds in the purchase of real estate. A part of the funds was accordingly invested in the purchase of real estate, which the husband and wife appointed upon trust on the death of the survivor of them for their eldest son, his heirs and assigns, subject, however, to a power of revocation and re-appointment. Subsequently and without reference to this appointment they executed an appointment in exercise of

the power given by the will and of every other power enabling them to do so, of the whole of the trust moneys, stocks, funds and securities comprised in the settlement, in favour of their children in equal shares; and the question submitted to the court was whether or not the second appointment had the effect of revoking the first. Warrington, J., thought that it had, but the Court of Appeal (Cozens-Hardy, M.R., and Buckley and Farwell, L.J.J.), overruled his decision, and held that it did not, *inter alia*, because there was no reference in the second appointment to the power of revocation contained in the first, nor any express intention manifested to exercise it; that the general words used in the second appointment did not include the lands in which part of the trust fund had been invested; but if they had, Farwell, L.J., expresses the opinion that the appointees would only have taken life estates for want of words of inheritance.

**CONTEMPT—ENFORCING INJUNCTION ORDER AGAINST CORPORATION  
—BREACH OF INJUNCTION AND UNDERTAKING—“WILFUL DISOBEDIENCE”—SEQUESTRATION—COSTS.**

In *Stancomb v. Trowbridge* (1910) 2 Ch. 190, the defendants, a municipal council, had been enjoined from sending sewage into a stream and had given an undertaking to cleanse it, and had violated the injunction and failed to perform their undertaking. On a motion for a sequestration the defendants sought to excuse their breach of the injunction on the ground that it had not been wilful disobedience, but was due to the negligence of their servants. Warrington, J., held that the defendants were liable for the acts of their servants and their negligence or dereliction of duty afforded no excuse. He, therefore, granted a sequestration, but directed it to lie in the office for six months and not to issue then if in the meantime the defendants effectually complied with their undertaking to the satisfaction of certain named parties. The defendants were ordered to pay the plaintiffs' costs as between solicitor and client.

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REPORTS AND NOTES OF CASES.

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**Province of Ontario.**

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HIGH COURT OF JUSTICE.

Divisional Court—K.B.].

[August 2.

**WILSON v. HICKS.***Life insurance—Assignment of policy—Gift—Intention—Beneficiary.*

Appeal from the judgment of Britton, J., in favour of plaintiff, who held an endowment insurance policy for \$5000. In December, 1896, he assigned the policy to the defendant describing her as his "fiancee." The consideration stated was "one dollar and other value consideration." Neither the policy nor the assignment were under seal. The plaintiff did not inform the defendant of the assignment until February, 1897. In April, 1897, the plaintiff wrote the defendant stating that the assignment was enclosed, but it was not sent to her, but to the insurance company, who made a memorandum of it, and notified the defendant. In January, 1909, the plaintiff asked the defendant to re-assign the policy, which she refused to do. Subsequently, by an instrument under seal, plaintiff assumed to revoke the assignment, directing that all moneys under the policy should be paid to himself. The plaintiff had kept the premiums paid. The action was for a declaration that the plaintiff was entitled to the policy and the moneys thereunder, and that the assignment had been effectually revoked.

*Held,* 1. That as the assignment was absolute upon its face, and the plaintiff had paid the premium from time to time, (thus re-affirming the gift) there was sufficient evidence that the gift was complete, and that the defendant was the owner of the policy. It was evidently intended as a gift *inter vivos*; also that delivery was not necessary, but even if it were there was a constructive delivery by the formal acts of registry in the insurance office, and the notification to the defendant; and oral evidence of an intention to revoke was not admissible.

2. It could not be said under R.S.O. 1897, c. 253, s. 151, sub-s. 3, as amended by 1 Edw. VII. c. 21, s. 2, sub-s. 4-5, that the donor had the right to change the beneficiary and that the

legal effect of the assignment to her was merely for the purpose of designating the defendant as the beneficiary.

3. There is nothing in the Act which restricts or interferes with the right of any person to assign a policy in any other mode allowed by law. In this case there was not merely the designation of a beneficiary but a transfer of absolute legal title.

Appeal allowed with costs.

*J. M. Best*, for plaintiff. *Proudfoot*, K.C., for defendant.

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Falconbridge, C.J.K.B.]

[August 31.

BROWN v. VALLEAU.

*Contract — Money advanced — Acknowledgment — Promise to “work off” debt.*

Action by the Canadian representative of commission merchants in Liverpool, Glasgow and London, to recover \$4,963.25, a balance alleged to be due by the defendant, a dealer in apples at Toronto, on account of advances made by the plaintiff for the purchase of apples. The defendant signed an acknowledgment admitting a balance at his debit of \$4,153.25. The acknowledgment did not state that the debt was not to be paid by the defendant, but only that it was to be discharged by the defendant working for the houses represented by the plaintiff. The defendant promised "to work with the company next season and until the above debt is worked off."

Held, that that did not amount to a discharge; and in any event the onus would lie on the defendant to shew that he was always ready and willing to "work off" the debt, but that he was prevented by some act or default of the plaintiff or of his principals; and that onus he had not met. As to the remainder of the plaintiff's claim, the defendant should have the benefit of the doubt. Judgment for the plaintiff for \$4,153.25, with interest from the 7th April, 1908, and costs. Counterclaim dismissed with costs.

*G. Drewry*, for plaintiff. *F. E. Hodgins*, K.C., and *W. H. Hodges*, for defendant.

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In *Ford v. Canadian Express Co.* on p. 545, 23rd line, the word "not" was omitted after the word "had."

## Province of Nova Scotia.

### SUPREME COURT.

Meagher, J.] IN RE ARTHUR W. WHITE. [August 18.

*Collection Act, R.S. 1900, c. 182, ss. 2, 27, 29—Order for payment by instalments—Fraudulent disposition of property—Committal for—Costs on—Co-debtors—Contribution as between—Costs incurred after judgment.*

On application under the Liberty of the Subject Act, R.S. 1900, c. 181, for the discharge from imprisonment of Arthur W. White, who had been committed to gaol by a commissioner, on proceedings under the Collection Act, R.S. 1900, c. 182, for fraudulent disposition of his property, the ground mainly relied on was that the order for committal, in addition to adjudging that the debtor had been guilty of fraudulent disposition of his property, ordered his imprisonment for the period of three months unless the amount of the debt was sooner paid and costs, including commissioner's and constable's fees upon the examination of his co-debtor as well as his own. There were two defendants, White and Green, and both were summoned to appear for examination at the same time. An order for payment by instalments was made against Green, but White obtained an adjournment of his examination for one week, after which evidence was heard and the order complained of was made.

*Held,* 1. The order for payment by instalments which the commissioner is authorized to make under s. 29, clearly, by virtue of s. 2, includes costs incurred subsequent to the judgment, no matter whether caused by the action of one defendant or both. When incurred, such costs become part of the judgment debt and enforceable as such.

2. Costs paid by one debtor under such circumstances would be the subject of indemnity or contribution as between himself and the other defendants.

3. There does not seem to be any provision, express or implied, to authorize the commissioner to split the amount due on the judgment and to award committal until the part affected by the fraud is discharged. Neither is there anything in ss. 27 and 29 to authorize dropping any costs which formed part of the judgment or the amount due upon it.

*Robertson, K.C., and Sangster, in support of application.  
Morse, contra.*

Longley, J.]

FERGUSON v. CHAPELLE.

[Aug. 31.

*Costs and taxation—Taxable and non-taxable items.*

In an action by plaintiff against defendant claiming damages for trespass committed upon plaintiff's land by entering thereon and cutting trees there was judgment in favour of plaintiff with costs. On taxation of costs before a Master of the court plaintiff sought to recover as part of his costs a sum of money paid to a number of men for going over the land in question and counting the stumps of trees cut and the Master having refused to tax this amount there was an appeal. By order 63 of the Jud. Act, rule 21, costs are to be taxed "according to the schedule of costs now in force."

*Held*, that the words of o. 63, r. 23, s. (7), "just and reasonable charges and expenses—properly incurred in procuring evidence and the attendance of witnesses" could not be given an interpretation to include the item claimed, and that the judgment of the Master must be affirmed.

*Held*, nevertheless, that under the words "maps, plans, surveys" plaintiff was entitled to tax for the services of men employed to assist the surveyor in making a survey of the land, such survey being necessary and having been rendered more difficult by reason of the action of defendant in destroying trees and obliterating blazed lines.

*Robertson*, K.C., in support of appeal. *Meagher*, contra.

Longley, J.]

[Aug. 31.

THE KING v. HECTOR McDONALD.

*Customs Act, s. 216—Conviction for offence—Defect in warrant—Discharge of prisoner ordered under certiorari.*

Defendant was arrested under a warrant charging him with having been unlawfully on board a vessel liable to forfeiture for a violation of the Customs Act, having taken on board a quantity of liquors at St. Pierre and landed it secretly at an island in the county of Cape Breton. Defendant pleaded guilty and was convicted and fined, and in default of payment of the fine imposed was sentenced to imprisonment for the period of two months. The section of the Customs Act under which the penalty as imposed (216) contains the words "if he has been knowingly concerned in any of such acts."

*Held*, that these words constituted an essential condition precedent to the completion of an offence and that their omission from the warrant under which the prisoner was arrested and convicted constituted a defect which rendered the warrant insufficient and that defendant was entitled to his discharge under certiorari proceedings.

*Carroll*, in support of application. *Mellish*, K.C., and *D. A. Cameron*, contra.

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Meagher, J.]

[September 13.

*CROSBY v. YARMOUTH ELECTRIC CO.*

*Practice—Notice of trial—Where sittings held alternately at two places in a county—O. 20, r. 3.*

Application to set aside plaintiff's notice of trial on the ground that it was not given in conformity with O. 20, r. 3, which provides that the statement of claim must in all cases shew the proposed place of trial. It appeared that the sittings of the Supreme Court in the County of Yarmouth are held alternately at Yarmouth and Tusket and that in this case the place of trial named in the statement of claim was Yarmouth, but that plaintiff being unable to bring his case on for trial at Yarmouth gave notice of trial for the next sittings of the court to be held at Tusket.

*Held*, that on the correct construction of the order plaintiff had the right to have his case tried at any place in the county in which the place of trial named in the statement of claim was situated. Application dismissed with costs.

*Covert*, K.C., in support of application. *Robertson*, K.C., contra.

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## Province of British Columbia.

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### COURT OF APPEAL.

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Full Court.]

[Sept. 16.

*PATERSON TIMBER CO. v. CANADIAN PACIFIC TIMBER CO.*

*Contract—Assignability—Contract made with firm, subsequently turned into incorporated company—Assignment of contract by firm to incorporated company—Rights of contracting company and assignee—Novation—Breach—Damages.*

By contract between defendants and plaintiff firm carrying on business under the name of the "P. Timber Company," plain-

tiff firm agreed to sell and defendants agreed to purchase the entire output for one year of certain lumber camps operated by the plaintiff firm. The contract was expressed to be binding upon the parties, their executors, administrators and successors respectively. Logs were to be paid for in cash on delivery. Shortly after the contract was entered into, the plaintiff firm caused a company to be incorporated under the name "The P. Timber Company, Limited," to which the company the firm assigned all its assets, including the timber limits on which the logs were to be cut, and including also the contract in question. The incorporated company agreed to perform all the contracts of the firm. The company continued to deliver logs under the contract for some months, until the defendants claiming that a breach of the contract had been made, notified the firm that further deliveries of logs would not be accepted. It was not clearly proved that the fact of the plaintiff firm having turned its business over to the company was ever clearly brought to the attention of the defendants, although the defendants in correspondence and in their minute book used the name of the incorporated company, and referred to the contract as being made with the incorporated company.

*Held*, 1. IRVING, J.A., dissenting. The alleged breach was assented to by the defendants' manager, and therefore the defendants were not entitled to repudiate the contract.

2. IRVING, J.A., dissenting. The contract was not of such a personal nature that it could not be assigned, or at any rate it did not require to be performed by the plaintiff firm personally, but could be performed by the company, and therefore the plaintiffs were entitled to recover damages for the wrongful repudiation of the contract by the defendants. *Tolhurst v. Associated Portland Cement Manufacturers* (1900) (1903) A.C. 414; *British Wagon Co. v. Lea* (1880) 5 Q.B.D. 149, referred to.

3. The facts did not establish a novation.

4. In estimating the damages to which the plaintiffs were entitled the amount of two booms sold to other parties with the consent of the defendants were not to be deducted from the amount of logs which the defendants were obliged to accept, but the damages were to be estimated without any reference to the fact of these booms being sold to other parties.

*Sir C. H. Tupper*, K.C., and *Griffin*, for appellants. *Craig* and *Hay*, for respondents.

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## *THE FISHERY QUESTION.*

The Hague Tribunal has justified its existence, and proved its usefulness as a great court for the trial of international disputes, by the manner in which it has dealt with the long-standing controversy between Great Britain and the United States respecting the Atlantic fisheries. Not only has it proved its capacity as an interpreter of the law of nations, but it has also maintained its dignity as the highest court known to the civilized world.

It is also satisfactory to us as Canadians to know that, often as we have accused the mother country of indifference to our interests, and negligence in protecting them, in this case there was no sign of indifference or negligence. From first to last the same position has been taken by her, and on the principal points of differences she has been justified in her contention by the decision of the Tribunal.

In preparation for the trial no expense was spared, and in its conduct the best talent of the British Bar was enlisted in our cause. Nor in this regard must we fail to record the good work that was done by the Minister of Justice, and the Chief Justice of the Supreme Court, as well as by those who assisted in the preparation of the case. To examine and digest the diplomatic records, the voluminous despatches, state papers, and treaties connected with this controversy which has lasted for a century; to extract what was useful and important, to decide upon the relevancy or irrelevancy of the evidence from such a mass of documents, none of which could be neglected, was a task not only of supreme importance, but of endless difficulty, and to have successfully accomplished it is something of which all concerned may well be proud, and to whom all credit should be given.

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A remarkable circumstance is that this award is accepted as satisfactory by both parties—a consummation much to be desired, but not often achieved. Of the points in controversy only two may be said to be of general interest, the others chiefly affecting the local interests of Newfoundland. The first of these was the claim of the United States, based on the words of one of the early treaties, that in certain parts of the coast their fishermen should use the fisheries in common with British subjects, that they were entitled to share in the administration of our coasts and harbours in all matters connected with the fisheries, and in regulations of the fisheries themselves. This claim was disallowed, and the rights of the provincial government fully established. The other point was the decision of the Tribunal that in respect of bays the three-mile-limit must be measured from a line drawn from headland to headland and not, as contended for by the government of the United States, follow the outline of the coast. This question we considered some time ago in connection with the jurisdiction of Hudson's Bay, and so far our contention has been maintained (*ante*, vol. 40, p. 132).

On both these important questions the decision was in our favour, and we may therefore claim a substantial victory. On the other questions "honours were divided," but, with the exception of the preposterous claim of the Americans first referred to, which they could hardly have expected to succeed in, and the decision in our favour on the headland question, matters remain much as they were, all points in dispute being settled one way or the other.

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#### THE DEVOLUTION OF ESTATES ACT.

In a recent case of *Beer v. Williams*, 21 O.L.R., at p. 51, Mr. Justice Britton says in reference to the effect of a conveyance by the personal representative of land, and the vesting of land under s. 13 without conveyance: "The legal position is now, as pointed out by Mr. Armour, on pp. 192, 194, 195, as follows: Where there has been a conveyance of the land by the executor

or administrator, the heir or devisee is free from an action at the suit of a creditor. Where there has not been a conveyance, but where the land has become vested in a devisee or heir under the 13th section of the Devolution of Estates Act, the heir or devisee shall continue to be liable: R.S.O. 1897, c. 127, as amended by 2 Edw. VII. c. 1, s. 4, and 2 Edw. VII. c. 17."

With great respect we venture to think this statement of the law is not quite accurate and is liable to be misleading, and we do not think it is the opinion of the author to whom the learned judge refers. The former Act, s. 20 (now 10 Edw. VII. c. 56, s. 24(1)), expressly states that where a conveyance is made by the executor or administrator to a beneficiary, a bona fide purchaser for value from such beneficiary shall hold the land freed from the debts of the deceased not specifically charged thereon; yet that notwithstanding such conveyance the section does not affect the rights of creditors against the beneficiary to whom the land is conveyed. The position appears rather to be this, that a bona fide purchaser for value from a beneficiary to whom the land of a deceased owner has been conveyed by the executor or administrator is entitled to hold the land freed and discharged from the debts of the deceased not specifically charged thereon, and the beneficiary to the extent of any benefit he may have received from such lands remains liable to creditors of the deceased. But a beneficiary on whom land has devolved under s. 13 and a bona fide purchaser from him for value, will both take the land subject to a liability to be sued by creditors of the deceased who are entitled to follow the assets into their hands. It is submitted that this is the real effect of 10 Edw. VII. c. 56, s. 24, and we think that is really Mr. Armour's conclusion.

Mr. Armour appears to consider that the right of a creditor of a deceased owner to follow lands into the hands of a devisee rested altogether on the Fraudulent Devises Act, 3 W. & M., c. 14, and that because such statute has not been continued, but in effect repealed, such right no longer exists. But it is submitted that that opinion is open to question. The reason land devised could not be got at in England in the hands of a devisee, except

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under the Fraudulent Devises Act, was because these lands were not assets at law for the payment of any debts except those by specialty, whereby the debtor had also bound his heir. But the Imperial statute, 5 Geo. II. c. 7, s. 4, to which Mr. Armour refers, had the effect of altering that rule in Ontario, and lands became thereby assets for the payment of all debts just as fully as goods and chattels, and as creditors had always a right to follow the personal assets into the hands of a legatee, it is submitted that the effect of the statute making lands assets for the payment of debts was to give creditors the right to follow the real assets into the hands of a devisee, for otherwise the statute of Geo. II. could not be effectuated.

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**DEFENCE OF COUNTERCLAIM AGAINST COMPANY  
IN SCI. FA. ACTION.**

We are rather inclined to think that the head-note in the case of *Grills v. Farah*, 21 O.L.R. 457, is somewhat confusing and may lead to possibly an erroneous impression as to the real effect of the judgment of Riddell, J., which it purports to summarize. The plaintiff had recovered judgment against a limited company and the action was in the nature of a sci. fa. against the defendant as a shareholder. The defendant set up by way of defence a set-off sounding in damages against the company alleging that he had been damaged by the company withholding from him certain shares which he had contracted to buy; these shares had nothing to do with the 500 shares which the defendant actually held and in respect of which he was sued. The Ontario Companies Act, 1907 (7 Edw. VII. c. 34), s. 69, provides that "any shareholder may (in such an action) plead by way of defence any set-off which he could set up against the company." After pointing out that at common law there was no such thing as "set-off" and that when "set-off" was allowed by statute to be set up as a defence it only applied to the case of mutual debts and not to cross claims for unliquidated damages; and that when "set-off" was pleadable the excess, if any, found due, might be re-

covered by the defendant in the action in which it was pleaded; and that now under Rule 127 a set-off for unliquidated damages may be pleaded by way of counterclaim. He concludes, "Consequently I think the legislature intended the shareholder to have the right to set-off even claims sounding in damages," which appears to be a distinct confession, that notwithstanding he had struck out the counterclaim at the trial, on further consideration he had come to the conclusion that it might be well pleaded as a defence pro tanto. He then proceeds to discuss the counterclaim on the merits and concludes that on its merits it could not be maintained. The result would therefore appear to be that his striking out the counterclaim at the trial on technical grounds, was erroneous, because a pleading containing substantial matter of defence ought clearly not to be struck out because the pleader chooses to call it a counterclaim where it is really a defence; but inasmuch as the plaintiff's claim failed, the striking out of the counterclaim was immaterial, because in no event could a defendant in such a case have judgment for it or for any excess over the plaintiff's claim against the defendant, the only party liable therefor being the company.

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**CORPORATIONS PURCHASING SHARES OF THEIR OWN STOCK.**

In view of the recent case of *Stavert v. McMillan*, 21 O.L.R. 245, it becomes important to consider what is the effect of a bank or other corporation acquiring directly or indirectly shares of its own stock. In the case in question, the manager of a bank in order to keep up its credit on the market, without the knowledge of the directors, applied \$400,000 of the bank's money in the purchase of shares of its own stock, the shares thus purchased being transferred to various nominees for the bank. The directors on being made aware of the transaction got some of their friends to give promissory notes payable on demand for various amounts of the stock so purchased, which were transferred to them, on the assurance that they would not be called on

to pay the notes, and that the stock would be resold and the notes would be satisfied out of the proceeds. The stock was not resold, but the notes were indorsed by the bank to the plaintiff, who sued the makers. In this state of facts the learned Chancellor held that the purchase of the stock by the bank was ultra vires, and that the bank was unable to transfer any title in the shares to the makers of the notes sued on, consequently, the notes sued on were made without consideration, and the plaintiff having taken them with notice could not recover on them.

This only disposes of the title of the makers of the notes in question. As to them the judgment is clear that the bank could not give them a title, but it seems to follow, if the bank could not give them a title, neither could it give anyone else a title. The vendors having received their purchase money therefor and having presumably transferred them to the bank's nominees, without notice would appear to have no longer any beneficial interest in, nor any liability for, the shares. Is not, therefore, the conclusion inevitable, that in the absence of statutory power authorizing such a transaction and enabling a corporation to re-issue the shares, such a purchase in effect amounts to a cancellation of the shares? But there is this difficulty, that if such be the result then the double liability, if any, in respect of such shares, is also gone, and that is a detriment to the creditors of the corporation; but those who are responsible for the improper diversion of the funds of the corporation might possibly be held liable for this damage as well as any other, which results from the transaction.

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#### *NERVOUS SHOCK.*

The question whether a nervous shock is an "accident" which entitles a workman to compensation under the Workman's Compensation Act in England recently came before a County Court judge in an action by a collier for compensation for injury under the following peculiar circumstances. He was working in a colliery when he heard a shout for help in the next working place. He there found that a fellow-workman had been knocked down by a

fallen timber prop. The plaintiff picked him up and carried him away. The effect upon the plaintiff was such that he sustained a nervous shock which incapacitated him from working at his usual place in the mine, and the manager refused to give him any other job and he had not worked since.

The County Court judge found that there was a genuine incapacity to work due to a nervous shock; that it was clearly the plaintiff's duty to his employer to go to the injured collier who shouted for help, and that his doing so arose both "in the course of" and "out of" his employment; and he awarded compensation to the plaintiff of a certain sum a week. From this judgment the employers appealed. The case was heard before the Master of Rolls, Lord Justice Farwell and Lord Justice Kennedy, and the finding of the County Court judge was upheld and the appeal dismissed. The Master of the Rolls in concluding his judgment, said it was clear from *Eaves v. Blaenclydach Colliery Co.* (1909) 2 K.B. 73, that if a workman sustained a nervous shock producing physiological injury which incapacitated him from his ordinary work as a collier this was just as much an accident arising out of and in the course of the employment and entitling the man to compensation as the loss of muscular power was. The present case was within the Act; in principle it was the same as if this man, in going to help his fellow-workman—as he was bound to do—had stumbled and fallen as he went and so sustained a physical injury; there was no difference in principle between an accident of that kind and the present: *Yates v. South Kirkby, etc., Collieries* (1910) 2 K.B. 538 at p. 542.

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"CESTUI QUE USE": "CESTUI QUE TRUST."

What is the plural of cestui que trust? Some write cestuis que trust, others cestui que trusts, and some cestuis que trustent. The first is probably the best, but there is not much to choose between it and the second; the third is hopelessly wrong. The present writer is not aware when cestui que trust was introduced into our language. It is, of course, bastard Norman-

French, and was probably introduced in the seventeenth century. It is obviously coined after the pattern of *cestui que use*, and when we come to *cestui que use* we are on sure ground so far as plurals are concerned, for it is familiar knowledge that *use* is derived from the Norman-French *oes*, which in its turn comes from the Latin *opus*, meaning "benefit"; thus in Britton (34a) the King orders an inquiry to be made as to the moneys which his officers have received a noster *oes*, "for our benefit," and the statute 15 Rich. II. c. 5 contains provisions designed to prevent land being held al oeps de gentz de religion, or al oeps des gildes & fraternitees. That *oes* or *use* in these passages means "benefit"<sup>1</sup> and not "use" in the sense of employment or user, is clear from a case cited by Littleton (s. 383), where an executor took the profits of his testator's lands to his own use, instead of applying them, as he ought to have done, to the use of the dead (al use le mort) by distributing the money for his soul.

*Cestui que use*, therefore, means "he for whose benefit," and *cestui que trust* means "he upon trust for whom" certain property is held.

*Que* is frequently used in law French in the same sense of "whose"; thus Blackstone says (Comm. ii. 264), "All prescription must be either in a man and his ancestors, or in a man and those whose estate he hath; which last is called prescribing in a *que* estate." So the phrase *cestui que vie* means "he for whose life," not "he who lives." It seems, however, that the word was originally spelled *qui*, for in his admirable introduction to the Year Books published by the Selden Society, the late Professor Maitland remarked (vol. i., p. xlviii): "The *qui* that is the case of the indirect object, the *qui* (formerly *cui*) that is doing the work of the Latin *cuius* and the Latin *cui* (as in the common phrase *qi heir il est*, 'whose heir he is'), does not so readily degenerate into *que*. Our phrase 'to prescribe in a *que* estate'

1. It occurs in the same sense at least as early as the *Chanson de Roland*, where there are several examples.—F.P.

is less<sup>2</sup> justifiable than our cestui que trust, since it represents *qui* estate *il ad*, ‘whose (not which) estate he has.’ ”

In answer to a letter suggesting that cestui que trust was a justifiable phrase made up by analogy to cestui que use and cestui que vie, Professor Maitland wrote as follows: “(1) The remark that cestui que trust is worse than ‘prescription in a que estate’ was perhaps unfortunate. I suspect, however, that cestui que trust was not made until people were regarding as verbs the use and the vie in the two older terms that you cite. I feel pretty sure that the clerks of ‘my time’—let us say circ. 1350—would not have written either cestui que vie or cestui que use. They would have written cestui *a qui oes le feffement fut fait*, cestui *pour qui vie le dit X tient*, and the like. I have here on my table photographs from seven MSS. additional to those that I previously examined, and I can repeat now with greater certainty that circ. 1350 the ‘indirect object case’ is usually *qui*. One may find *que heir il est*, as one may find almost anything; but it is not usual.

“By the time that ‘uses’ are becoming prominent the language has fallen to a considerably lower level than that represented by my introduction. I suspect a gradual descent from cestui *a qui oes* (*la terre est tenue*, or the like) to cestui que use, but I fancy that by the time that men have fashioned the latter phrase they are beginning to think of *que* as the subject of a verb. The gradual substitution of *use* for *oes* (*opus*) shews that the language is already in a bad way. Is it not also to be remembered that the early feoffments to *uses* are generally feoffments to the *use* of the feoffor? I think one might say that in the first stage of the development the cestui que trust is a *trustor* who has placed trust in a *feoffee*; he is author of the trust as well as sole beneficiary. This makes further confusion possible.”

The other two paragraphs of Professor Maitland’s letter relate to different questions, also discussed in his introduction. As everything from his pen is of interest, no apology is required for printing them here.

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2. This is obviously a *lapsus calami*; “less” should be “more.”

The second paragraph is in answer to the suggestion that que in the sense of "because" might possibly be derived from the Latin quia.

"(2) I thought much about the que which means *for* being derived from quia, and nearly made this suggestion; but I could not find the slightest support for this in French grammars and dictionaries. All seemed to agree that quia did not live, and that que is quod even when it means *because*. In Spanish one can use que in this way as an equivalent for the longer por que, and I understand that in Latin this would be quod instead of per quod (Ande V., que es tarde—says a grammar—Come along, for it is late)."

The third paragraph is in answer to the suggestion that the -ee, in which many old French words terminate, resembles the -éc in masculine words in modern French, such as musée (from museum), and the e in foie (from ficatum), and that the second or final e represents the Latin -um.

"(3) As to -ee for mod. Fr. -e. . I think that if we said that in Le bref fut portee the last e really descended from the -um of portatum, we should be flying in the face of a rule that is based on a very wide induction, and I suspect that we should be told that even in Anglo-French this doubled e does not appear until long after the Conquest. Are your examples to the point? Musée is a word of 'learned formation.' I think we should be told that if museum had had a continuous life in the mouths of the people it would have come out as musé; just as senatum would have become séné and not the 'learned' sénat. As to foie, I have not my books with me, and I forget how the *foi-* is explained; but I fancy that the final e is the a of the -atum, not the -um."<sup>3</sup>

The letter is dated "Gran Canaria, 23 Jan., 1904."

—*Law Quarterly.*

3. Littré s. v. points out that the form foie postulates a vulgar Latin ficatum or ficitum. Ficatum would have given a termination in -é, to which corresponding forms occur in some other Romance languages.—F.P.

***WHAT CONSTITUTES "SERIOUS AND PERMANENT DISABLEMENT."***

The recent English case of *Hopwood v. Olive and Partington, Limited*, 102 L.T. Rep. 790, is one of the very few cases, if not the only one, that has come before the court on the question as to what amounts to "serious and permanent disablement" within the meaning of the Workmen's Compensation Act, sub-s. 2(c). This statute relieves an employer from liability to pay compensation to a workman who is injured by accident arising out of and in the course of his employment, if the injury is attributable to his "serious and wilful misconduct, . . . unless the injury results in death or serious and permanent disablement."

In the case referred to the workman was a lad employed at certain paper mills. His work was to catch the paper as it came off the cutting machine, and at the end of the week to clean the machine. On one occasion he started, in breach of his employers' regulations, to perform that latter duty while the machine was still running, with the result that his right hand was caught in a cogwheel, and his first and third fingers were cut off at the top joint. The County Court judge had no course open but to find that the workman had been guilty of "serious and wilful misconduct." His Honour held, however, that the injury which the workman had sustained amounted to "serious and permanent disablement" within the meaning of the sub-section. He accordingly gave effect to the exception in favour of the workman, and awarded him compensation. That the disablement, if it was "disablement" at all, was "permanent," there was no gainsaying. But whether it was "serious" enough to satisfy the sub-section was another consideration. The Court of Appeal, adopting the view taken by the County Court judge, declared that it was. "The workman," said the Master of the Rolls (Cozens-Hardy), "may be disabled in the labour market from being employed in innumerable occupations which otherwise would possibly have been open to him. This renders it a serious disablement, and it is not one of a temporary character." Lord Justice Buckley gave it as his opinion that "disablement" meant

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the same thing as "disable," that is to say, less able to earn his full wages. Loss of portions of two fingers of the right hand would unquestionably, in certain callings, render a workman much less able to earn full wages. Regarded in that light, he would be both seriously and permanently disabled.—*Law Times.*

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The subject is not a pleasant one to discuss; but it is important, and has attracted much attention in various countries. We learn from one of our English exchanges that Dr. Rentoul, in an address to the Psychological Society of the British American Medical Association again urges the importance of the surgical sterilization of the unfit. The remedy he calls for, with a view to render marriage unproductive in certain stated cases, is, he declares, simple and harmless, injuring neither the mental or the physical condition. It would not prevent marriage but would prevent the production of children. He gives some statistics shewing where five weak-minded, unmarried females had been delivered of fifteen idiot infants in a workhouse. Another doctor has pointed out that ninety-two habitual inebriate women had had eight hundred and fifty infants. As our contemporary remarks, "Naturally, in all sophisticated societies, drastic proposals of this sort filter slowly through the public conscience": but we are told that in England there is a steadily growing feeling in their favour, and that they are now being discussed in France, Germany and Switzerland. It would appear, however, that the United States is the only country which has legislated upon the subject. An Act has been passed in the State of Indiana "to prevent procreation of confirmed criminals, idiots, imbeciles, and rapists—providing that superintendents or boards of managers of institutions, where such persons are confined, shall have the authority and are empowered to appoint a committee of experts, consisting of two physicians, to examine into the mental condition of such inmates." California has an enactment much to the same effect.

*A JUDICIAL NONAGENARIAN.*

The death, in his ninety-second year, of the Right Hon. Hedges Eyre Chatterton, which we recorded last week, removes from the legal and judicial world one of its most interesting links with the past. Mr. Chatterton was one of a number of men of great eminence at the Bar and on the Bench who flourished in the last century and attained the nineties. Two Lord Chancellors of England—Lord Lyndhurst, who died in 1863, and Lord St. Leonards, who was Lord Chancellor of Ireland and subsequently Lord Chancellor of England and died in 1875—had entered respectively on their ninety-third and ninety-fifth years. The Right Hon. Thomas Lefroy, Lord Chief Justice of Ireland, discharged the duties of that great office till 1866, when he had entered on his ninety-first year, and lived for three years after his retirement from the Bench. The Right Hon. James FitzGerald, who in 1799 ceased to hold the office of Prime Serjeant of Ireland, which was abolished in 1805 owing to his opposition to the Government on the question of the Union, lived into the thirties of the last century, when he was well advanced in the nineties. Mr. Robert Holmes, the leader of the Irish Bar, although a stuff gownsman—he refused all preferment, including the Solicitor-Generalship—was born in 1765 and died in 1859.

Mr. Thomas De Moleyns, Q.C., who at his death in 1900 had entered on his ninety-third year and was the father of the Irish Bar, had a curious parity in his career with Mr. Chatterton. They were both natives of Munster; they both had served in the Royal Navy as midshipmen before they matriculated in Trinity College, Dublin; and were both leaders on the Munster Circuit contemporaneously. Mr. Chatterton was, strange to say, called to the Irish Bar, at which the call is made, not at an Inn of Court, as in this country, but by the Lord Chancellor sitting alone in court, by a Lord Chancellor, Sir Edward Sugden (Lord St. Leonards), who himself lived to be a nonagenarian.—*The Law Times.*

**REVIEW OF CURRENT ENGLISH CASES.**

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**PASSING OFF—EVIDENCE OF PASSING OFF—IDENTIFICATION OF GOODS PASSED OFF WITH THOSE OF PLAINTIFF.**

*Hunt v. Ehrmann* (1910) 2 Ch. 198. This was an action to restrain the defendant from passing off goods sold by them as goods of the like description sold by the plaintiffs. The plaintiffs were wine dealers, and the defendants were also retail wine merchants, and issued a price list in which they advertised for sale "Hunt Roupe's Grand Old Crusted Port, over six years in bottle . . . usual credit price per doz. 60s, now offered by us at per doz. 34s." The plaintiffs sold no wine in bottles and sold two distinct classes of port wine, one a superior and the other an inferior and cheaper wine. The plaintiffs alleged that the defendants were passing off by their advertisement the plaintiffs' inferior wine as and for the plaintiffs' superior wine. It was proved that the plaintiffs sold no matured wine in bottles, as to which it could be said the usual credit price was 60s. per dozen. In these circumstances Warrington, J., held that the plaintiffs had failed to establish the alleged passing off as there was no sufficient identification of the wine advertised by the defendants with any wine sold by the plaintiffs.

**POWER—POWER TO APPOINT LIMITED AMOUNT—GENERAL POWER  
—EXCLUSION OF PERSON FROM BENEFIT WHO DISPUTED WILL  
—OVERRIDING POWER TO APPOINT MIXED FUND—WILLS ACT  
1837 (1 VICT. c. 26) s. 27, (10 EDW. VII. c. 57, s. 30 (ONT.))**

*In re Wilkinson, Thomas v. Wilkinson* (1910) 2 Ch. 216. In this case the question for decision was whether under s. 27 of the Wills Act, 1837 (see 10 Edw. VII. c. 57, s. 30 (Ont.)) a residuary devise and bequest had the effect of executing a power of appointment vested in the testatrix. The facts were that one Thomas Wilkinson gave his real and personal estate to trustees in trust for his wife for life, and he gave her power by her will to appoint that the trustees should raise and set apart a sum sufficient to pay £2 10s. per week, and declared that she should have absolute power by her will to dispose of that sum when raised as she might think fit, the testator, however, expressing by his will a wish that she should be able to direct the payment

of the £2 10s. per week to his son James during his life, but that if she should not think fit to exercise the power in favour of James she should have full power to dispose of the same as she might think best. "Subject as aforesaid," the testator gave his estate in trust after his wife's death in favour of his children. A power of sale was given by the testator to his trustees, and he declared that any of his children disputing his will should be deprived of all interest thereunder. The testator died in 1894 leaving his wife and all the children named in the will surviving him. James died in the lifetime of his mother. The mother died in 1909, leaving a will whereby she devised and bequeathed "all the residue of my real and personal estate not hereby otherwise disposed of." It was contended that this clause did not operate as an execution of the power to appoint the sum necessary to raise £2 10s. per week in perpetuity, because it was not a general power of appointment, as the exclusion of James and the other children who disputed the will rendered the power special; and that if there were a general power it did not apply to real estate; and that there was no trust for conversion, and that in order that the will of the widow might operate as an appointment it was necessary first to have created a charge of the money on the land. Parker, J., who tried the case decided (1) that a charge on the testator's residuary real and personal estate for any sum the widow might appoint under the power was created by the words "subject as aforesaid." (2) That notwithstanding the exclusion of children who disputed the will from the benefit of the power, the widow in the events which had happened had a general power in respect of the sum which might be raised. (3) That although there was no express trust for conversion, the power was an overriding one to appoint a mixed fund of realty and personality, and (4) that by virtue of s. 27 of the Wills Act (Edw. VII. c. 57, s. 30 (Ont.) the power was exercised by the residuary gift in the wife's will.

SETTLEMENT—CONSTRUCTION—MISTAKE OF FACT—MISDESCRIPTION—CLERICAL ERROR—"TAIL MALE" INSTEAD OF "TAIL GENERAL."

*In re Alexander Jennings v. Alexander* (1910) 2 Ch. 225. This was a summary application by trustees, for the construction of a marriage settlement made in 1886, whereby it was provided that if the settler's eldest son should become entitled to his grandfather's real estate under his will for an estate "in tail male"

he should be excluded from all share in the settlement. Under the will of his grandfather the eldest son had become entitled to an estate tail general, and the question was whether or not he was deprived of any benefit under the settlement. Parker, J., who tried the action held that as the settlor must have known at the date of the settlement that if her eldest son came into her father's real estate under his will, it must be for an estate tail general, and not an estate tail male, the insertion of the word "male" in the settlement must be treated as a misdescription and the settlement construed as if the word were omitted, and that consequently the eldest son was excluded from sharing in the settlement moneys.

**WILL—GIFT OF LEASEHOLD SUBJECT TO A LEGATEE PERFORMING COVENANTS OF LEASE—INDEPENDENT GIFT TO SAME LEGATEE OF DIVIDENDS—ACCEPTANCE OF LEGACIES—MORTGAGE OF HOUSE AND DIVIDENDS IN ONE MORTGAGE—FORECLOSURE—DISCLAIMER BY MORTGAGEE—LIABILITY FOR REPAIRS.**

*In re Loom, Fulford v. Reversionary Interest Society* (1910) 2 Ch. 230. By his will a testator bequeathed a leasehold to one Marian Ross, for life, she performing the covenants in the lease. He also left her dividends on stocks for life. She accepted the legacies and went into possession of the leasehold, and subsequently mortgaged to the defendant company by one mortgage both the leasehold and the dividends. The defendant company foreclosed the mortgage but left the mortgagor in possession of the leasehold. She subsequently became lunatic. The house on the leasehold fell out of repair, and the lessors had given notice of their intention to terminate the lease. The mortgagees disclaimed all interest in the lease and refused to consent to the dividends being applied in making repairs thereon. The repairs would cost £72, and the leasehold was estimated to be worth £300. In the interests of the remaindermen, the trustees applied to the Court by originating summons to determine the rights of the parties, and Parker, J., held that, on accepting the legacies, Marian Ross became personally bound to pay the rent and observe the covenants in the lease, and that the trustees so long as she remained the owner of both dividends and leasehold, had an equitable right to apply the dividends in keeping down the rent and otherwise fulfilling the covenants of the lease, but that the gifts of the leasehold and dividends were distinct, and that the mortgagees by accepting an assignment of both had not

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thereby incurred any liability to discharge the covenants of the lease, and, not having taken possession of the leasehold, were entitled to the dividends without any liability to satisfy the rent or other liabilities under the lease.

**TRADE MARK—REGISTRATION—TECHNICAL TERM—DECEPTIVE USE OF DESCRIPTIVE WORD.**

*Re Cassella & Co.* (1910) 2 Ch. 240. In this case the applicants desired to register the word Diamine as a trade mark. It appeared that the word was a known chemical term which indicated that the substance to which it was applied contained two amine groups, but that it had been used by the applicants for twenty years for their dyes, whether they contained one, two, or more amine groups, or no amine group at all. The application was rejected, (1) because the word was not distinctive, but descriptive, and (2) because the applicants had used it deceptively.

**COMPANY—DIRECTOR—CONTRACT OF SERVICE—RESTRAINT OF TRADE—WINDING-UP—DISMISSAL OF SERVANT—SPECIFIC PERFORMANCE.**

*Measures Brothers v. Measures* (1910) 2 Ch. 248. The plaintiffs having appealed from the decision of Joyce, J. (1910) 1 Ch. 336, noted ante, p. 303, the Court of Appeal (Cozens-Hardy and Buckley and Kennedy, L.J.J.) affirmed the decision, Buckley, L.J. dissenting on the ground that in his opinion the contract of the plaintiffs to employ the defendant, and his contract not to engage in a similar business were not interdependent, but separate and distinct, and that the refusal of the receiver in the winding-up proceedings to continue defendant's employment was not the act of the company. But the other members of the court thought that though the company might not incur any contractual liability by the discontinuance of the defendant's employment, yet the fact remained that the company could not carry out its part of the bargain and that the contractual relation was thereby determined and ceased to be in force.

**MORTGAGE—MERGER—SUBROGATION—PAYMENT OF MORTGAGE BY STRANGER—EQUITABLE TRANSFER—PRESUMPTION THAT SECURITY KEPT ALIVE—IGNORANCE OF MORTGAGOR—AGREEMENT TO TAKE DIFFERENT SECURITY.**

In *Butler v. Rice* (1910) 2 Ch. 277, the plaintiff claimed to be the holder of a mortgage of a leasehold, which he claimed to

foreclose. The defendant, Mrs. Rice, a married woman, was the owner subject to a charge in favour of a bank for £450, on a deposit of the title deeds. The plaintiff was applied to by Mr. Rice, the husband of the owner, to advance money to pay off the charge and he thinking the husband was the owner agreed to do so on the understanding that a mortgage was to be executed for £300, and a guarantee given by Rice and his wife for £150, and that in the meantime the solicitor for Mr. and Mrs. Rice was to hold the title deeds for the plaintiff. The money was accordingly advanced and the bank's charge paid off and the title deeds handed to the solicitor, but Mrs. Rice then refused to execute the mortgage and claimed that Mr. Rice owed her £450 and she had never authorized him to make any such arrangement with the plaintiff. Warrington, J., came to the conclusion that this was a mere scheme on the part of husband and wife to cheat the plaintiff, which, however, he held to be unsuccessful on the ground that it must be presumed in the circumstances that the plaintiff intended to keep the bank's charge alive, and was entitled to be subrogated to their rights as chargees. One little point in the question of costs may be noted. The husband was made a defendant, but no relief was asked against him, he, however, put in a defence setting up certain allegations in support of his wife's claim and though the learned Judge thought him an unnecessary party he refused to give him any costs.

DONATIO MORTIS CAUSA—SUBSEQUENT GIFT BY WILL—REVOCA-TION—SATISFACTION.

*Hudson v. Spencer* (1910) 2 Ch. 285. In this case a testator had made a gift to his housekeeper of deposit notes aggregating in value £2,000 in circumstances which made the gift a valid donatio mortis causa. Two days later he made his will whereby he bequeathed to his housekeeper a legacy of £2,000. The question was whether the will was a revocation of the gift, or whether the legacy was to be deemed a satisfaction of the donation. Warrington, J., answered the question in the negative there being no circumstances shewn from which the court could properly infer the contrary.

**INSURANCE—LIFE POLICY—MORTGAGES OF POLICY—PRIORITIES—NOTICE.**

*In re Weniger* (1910) 2 Ch. 291. In this case the relative rights and priorities of mortgagees of a policy of life insurance were in question, and Parker, J., decided that where a mortgagee advances money on the security of a life policy which is not handed over to him he has, if it is in the hands of a prior mortgagee, constructive notice of his mortgage and cannot by first giving notice of his mortgage to the insurers obtain priority over such prior mortgage; and he also held, that in such circumstances it is not necessary for the subsequent mortgagee to give any notice to the prior mortgagee, and that if the latter in ignorance of the subsequent mortgage make further advances, such advances may be postponed to the subsequent mortgagee if he has given the insurers previous notice of his claim. But a doubt is thrown out by the learned judge whether if such subsequent advances are made in pursuance of a provision in that behalf in the original mortgage and without notice of the mesne mortgage in such a case the subsequent advance might not have priority over the mesne mortgage.

**LIQUOR LICENSE—BONA FIDE TRAVELLER—SALE OF LIQUOR WITHIN PROHIBITED HOURS—GUEST OF BONA FIDE TRAVELLER—GUEST UNLAWFULLY ON LICENSED PREMISES—LICENSING ACT, 1872 (35-36 VICT. c. 94), s. 25—(R.S.O. c. 245, ss. 54, 56, AS AMENDED BY 6 EDW. VII. c. 47, s. 13 (ONT.)).**

*Jones v. Jones* (1910) 2 K.B. 262 was a prosecution for breach of the Licensing Act. The facts were that a bona fide traveller had invited the appellant to licensed premises as his guest for the purpose of getting liquor to drink when the premises were required to be closed to all persons except bona fide travellers. The magistrate had convicted the appellant of being unlawfully on the premises during prohibited hours, and the Divisional Court (Lord Alverstone, C.J. and Channell and Coleridge, J.J.) held that the conviction was right. The case would appear to be applicable to the construction of R.S.O. c. 245, ss. 54, 56, as amended by 6 Edw. VII. c. 47, s. 13, which makes a similar exception in favour of "guests" at a tavern to that made by the English Act in favour of bona fide travellers.

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**SOLICITOR—UNDERTAKING BY SOLICITOR TO PAY MONEY TO A PERSON NOT HIS CLIENT—ABSENCE OF MISCONDUCT—ENFORCING UNDERTAKING NOT GIVEN IN ANY LEGAL PROCEEDING—SUMMARY ORDER FOR PAYMENT.**

*United Mining and Finance Corporation v. Becher* (1910) 2 K.B. 296. This was a summary proceeding instituted by originating summons to enforce an undertaking given by a solicitor, whereby he undertook to refund to the applicants' solicitor a sum of money placed by the applicants in his hands for the purpose of negotiating a sale, the undertaking not having been given in the course of any legal proceeding, and there was no suggestion of any bad faith or misconduct on the part of the solicitor. Hamilton, J., held that the court had jurisdiction to enforce the undertaking in a summary way and made an order for payment of the money pursuant to the undertaking. According to the note of the reporter the solicitor has instituted an appeal from the order.

**SHIPPING—PUTTING INTO PORT OF REFUGE—DEVIATION—UNSEAWORTHINESS—EFFECT ON CONTRACT OF PUTTING INTO PORT OF REFUGE—LIEN FOR “DEAD FREIGHT”—DAMAGES.**

In *Kish v. Taylor* (1910) 2 K.B. 309, the action was brought by shipowners to recover freight, and to enforce a lien therefor on the cargo. It appeared that the plaintiffs' vessel, through their default, put to sea in an unseaworthy condition by reason whereof it was compelled to put into a port of refuge. The defendants contended that this constituted a deviation as having been caused by the plaintiffs' wrongful act, and put an end to the contract of carriage and relieved the cargo from the obligations of the contract. Walton, J., who tried the case, was of the opinion that putting into a port of refuge in such circumstances did not constitute a deviation, and that the defendants and the cargo were accordingly liable. The contract provided that the plaintiffs were to have a lien for “dead freight” and under that provision the plaintiffs were held entitled to a lien for the unliquidated damages arising from the breach of contract by the defendants in failing to load a full and complete cargo.

**RIGHT OF SEARCH—“BAG OR OTHER INSTRUMENT FOR CARRYING FISH”—COAT POCKET.**

*Taylor v. Pritchard* (1910) 2 K.B. 320 was a case stated by justices. The prosecution was brought under a Fishery Act,

which authorized the complainant, a water bailiff, to search any "bag or other instrument for carrying fish." The complainant claimed under this provision to be entitled to search the coat pockets of the defendant, and the complaint was lodged because the defendant refused to permit such search. The justices held that the Act did not authorize a search of the person and dismissed the complaint, but the Divisional Court (Lord Alverstone, C.J., and Channell and Coleridge, JJ.) was of the opinion that the defendant ought to have been convicted and allowed the appeal.

**EMPLOYER AND WORKMAN—DRIVER OF CAB—WORKMEN'S COMPENSATION ACT, 1906 (6 EDW. VII. c. 58).**

*Doggett v. Waterloo Taxicab Co.* (1910) 2 K.B. 336. The plaintiff in this case was the driver of a taxicab belonging to the defendant company. He was paid a percentage of the takings registered by the taximeter. When he took out a cab from the defendants' yard he took it where he pleased and kept the cab sometimes till next day or for several days, and except by refusing to let him have the cab, the defendants had no control over him and could not dismiss him. While driving the cab he was injured, and the action was brought to recover compensation under the Workmen's Compensation Act of 1906. The county judge who tried the case held that the plaintiff was a daily servant of the defendants and that they were liable to make compensation, but the Court of Appeal (Cozens-Hardy, M.R., and Buckley and Kennedy, L.J.J.) were unable to agree with this view, and held on the contrary that the relation between the parties was not that of master and servant. According to Buckley and Kennedy, L.J.J., the contract was merely one of bailment.

**PARTIES TO ACTION—JOINDER OF DEFENDANTS—ALTERNATIVE RELIEF CLAIMED AGAINST SEVERAL DEFENDANTS—JOINDER OF DIFFERENT CAUSES OF ACTION—RULES 126, 127, 128—(ONT. RULES 186, 187, 188).**

In *Compania Sausinena, etc., v. Houlder* (1910) 2 K.B. 354 the plaintiffs entered into a contract with the defendant Houlder whereby the latter agreed to carry the plaintiffs' goods, on certain named steamers belonging to the Houlders or on other suitable steamers in addition or substitution therefor. It was subsequently agreed that a certain cargo of the plaintiffs should be shipped on

a vessel called the Devon, procured by the Houlders and belonging to another company on the terms of the first mentioned contract. This cargo was shipped and the master of the Devon signed the bills of lading in respect of it. The cargo was damaged owing to the alleged unseaworthiness of the Devon. The plaintiffs joined both the Houlders and the owners of the Devon as defendants, claiming against the former under the contract above mentioned and against the latter on the bills of lading. On a motion by the owners of the Devon to strike out their names as defendants, as having been improperly joined, Hamilton, J., ordered their names to be struck out, but on appeal the Court of Appeal (Williams, Moulton and Buckley, L.J.J.), reversed his order, holding that in the circumstances the defendants were properly joined, and that it was not necessary in order to join the applicants as defendants that the cause of action against them and their co-defendants should be identical, but that it was sufficient that though technically different in form the causes of action were substantially the same.

LIMITATION OF ACTION—RENT CHARGE—PERSONAL COVENANT TO PAY—CIVIL PROCEDURE ACT, 1833 (34 Wm. IV. c. 42), s. 3—REAL PROPERTY LIMITATION ACT, 1874 (37-38 VICT. c. 57), s. 1—(10 EDW. VII. c. 34, ss. 5, 49 (ONT.)).

*Shaw v. Crompton* (1910) 2 K.B. 370 was an action to enforce a covenant for payment of a yearly rent charge. There had been no payment of the rent charge since September, 1893, and owing to the twelve years' limitation imposed by the Real Property Limitation Act, 1784 (37 & 38 Vict. c. 57), s. 1 (which in Ontario is ten years, see 10 Edw. VII. c. 34, s. 5), the charge as against the land was barred and extinguished; but it was contended by the plaintiff that the twenty-year limitation for actions on covenant, 3-4 Wm. IV. c. 42, s. 3 (10 Edw. VII. c. 34, s. 49 (Ont.)), not having expired he was entitled to maintain the action, but Bray, J., held (following *Sutton v. Sutton*, 22 Ch. D. 511), that the remedy against the land being barred, the remedy on the covenant was also gone. We may note that the Court of Appeal for Ontario in *Allan v. McTavish*, 2 A.R. 278, came to a different conclusion on the like facts, and consequently *Sutton v. Sutton* has not been followed in Ontario: see *Macdonald v. Macdonald*, 11 Ont. 187; *McDonald v. Elliott*, 12 Ont. 98, 22 C.L.J. 229.

PRINCIPAL AND AGENT—LIABILITY OF PRINCIPAL ON CONTRACT  
MADE BY AGENT CONTRARY TO HIS ORDERS—MANAGER OF HOTEL  
—LICENSE IN NAME OF MANAGER—PRESUMPTION AS TO HOUSE  
BEING TIED—UNDISCLOSED PRINCIPAL.

In *Kinahan v. Parry* (1910) 2 K.B. 389 the plaintiffs had sold whisky to the manager of a hotel who held the license therefor in his own name. The plaintiffs supposed that he was the principal, but they discovered subsequently that the defendants were the owners of the hotel, and the action was brought against them to recover the price of the whisky. It appeared that the manager had been instructed by the defendants to order spirits from a particular firm, with whom the plaintiffs were in no way connected, and from no other place; but this prohibition was unknown to the plaintiffs. The County Court judge, who tried the action, gave judgment in favour of the defendants, but the Divisional Court (Pickford and Coleridge, JJ.) reversed his decision. The County Court judge thought the case governed by *Davie v. Simmons*, 41 L.T. 783, where the facts were similar, except that there it was known to the plaintiffs in that case that the manager was merely an agent, and the court held that in such cases, it being common knowledge that public houses are often tied, the manager could not be presumed to have had unlimited authority. The Divisional Court on the other hand held the case to be governed by *Watteau v. Fenwick* (1893) 1 Q.B. 346, where it was held by a Divisional Court that where a vendor deals with an agent of an undisclosed principal, assuming the agent to be the principal, the ordinary doctrine as to principal and agent applies, that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding any undisclosed limitation put upon that authority by the principal.

WHARFINGER—CARRIAGE OF GOODS BY LIGHTER FROM SHIP TO  
WAREHOUSE—COMMON CARRIER—LIABILITY OF WHARFINGER.

*Consolidated Tea Co. v. Oliver* (1910) 2 K.B. 395. In this case the defendants were wharfingers and their business was to carry goods from ships to their warehouse by means of lighters, they did not hold themselves out as ready to carry goods for any other persons; while one of their lighters containing the plaintiffs' goods was thus in transit it was sunk by a collision with another vessel, and the plaintiffs' goods were damaged. It was ordered that the preliminary question should be tried, whether in

the circumstances the defendants undertook the liability of common carriers; and Hamilton, J., before whom that question was tried, held that they did not, but were only liable for negligence.

**SHIP—CHARTER-PARTY—DEMURRAGE CLAUSE—NO TIME SPECIFIED FOR DEMURRAGE.**

*Wilson v. Otto Thoresen* (1910) 2 K.B. 405. This was an action by the charterers of a vessel to recover damages occasioned by the vessel leaving port before she had loaded a complete cargo. The charter-party contained the following clauses: "Cargo to be loaded and discharged as fast as steamer can receive and deliver as customary at respective ports and during customary working hours thereof." "If vessel be longer detained to be paid at the rate of four pence per gross register ton per day." The ship arrived at Calais and commenced loading at 12.30 p.m. the same day. The customary working hours were from 7 a.m. to 5.30 p.m. A reasonable time for loading the cargo was 2½ days, and that time would be up on 20th December at 5.30 p.m. The ship was advertised to leave Las Palmas with a cargo of fruit on 7th January, and the master being anxious to arrive at that port in time left Calais at 4 p.m. on December 30, having an incomplete cargo; had she waited until 5.30 p.m. the following day 136 tons more of cargo could have been loaded. The question, therefore, was whether the vessel was bound to wait a reasonable time on demurrage, there being no fixed time named for demurrage. Bray, J., held that where a contract is silent on this point the law limits the time of demurrage to what is reasonable in the circumstances, and he, therefore, held that the defendants were liable for the damages less one day's demurrage.

**ESTOPPEL—RES JUDICATA—LANDLORD AND TENANT—AGREEMENT FOR LEASE—ACTION FOR RENT—DEFENCE OF NO CONCLUDED AGREEMENT — SECOND ACTION — DEFENCE OF STATUTE OF FRAUDS.**

In *Humphries v. Humphries* (1910) 2 K.B. 531 the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.J.J.) have unanimously affirmed the judgment of the Divisional Court (1910) 1 K.B. 796, noted ante, p. 443.

**CONTRACT—BREACH OF CONTRACT—DAMAGES CONTINGENT PROFITS—REMOTENESS—COSTS.**

*Sapwell v. Bass* (1910) 2 K.B. 486 was an action to recover

damages for breach of a contract whereby the defendant who owned a stallion agreed that during the season of 1909 it should serve a brood mare of the plaintiff for a fee of £315 to be paid at the time of service. Before the time for the fulfilment of the contract arrived the defendant sold the stallion to a purchaser in South America. It appeared by the evidence of the plaintiff that the profits he had made by the sale of foals got by the same stallion out of other mares of the plaintiff considerably exceeded £315, and he claimed damages on the footing that he had lost a valuable foal. Jelf, J., who tried the action, however, came to the conclusion that the damages claimed were too remote, and all that the plaintiff could recover was nominal damages, and he left each party to pay his own costs.

**CRIMINAL LAW—STATEMENT MADE IN THE PRESENCE OF PRISONER  
—ADMISSIBILITY OF EVIDENCE—MISDIRECTION.**

*The King v. Norton* (1910) 2 K.B. 496. This was a prosecution for having carnal intercourse with a child under thirteen. Shortly after the alleged commission of the offence the child who was not called as a witness pointed out the prisoner and accused him of the offence, which he denied. This statement was admitted as evidence at the trial. But the Court of Criminal Appeal (Lord Alverstone, C.J., and Pickford and Coleridge, J.J.) held that the only ground on which such a statement would be admissible was where the prisoner had then by his words or conduct acknowledged the truth of the accusation, but there being here no evidence of any such acknowledgment by word or deed the statement was inadmissible and the conviction of the prisoner was quashed. How *King v. Thompson*, ante, p. 330, can be reconciled with this case we fail to see.

**SALE OF GOODS—RIGHT OF VENDOR TO STOP IN TRANSITU AS AGAINST  
SUB-PURCHASER—ASSENT BY VENDOR TO SUB-SALE—UNPAID  
VENDOR'S LIEN—SALE OF GOODS ACT, 1893 (56-57 VICT. c.  
71), s. 47.**

*Mordaunt v. The British Oil & Cake Mills* (1910) 2 K.B. 502. The Sale of Goods Act, 1893, which has been declared to be declaratory of the common law, provides by s. 47, that the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto; and it was held by Pickford, J., in this action that the assent must

be given in such circumstances as to shew an intention on the part of the seller to renounce his right against the goods sold by the buyer, and therefore an assent to a sale of an unascertained part of the goods could not have that effect. The circumstances of this case were, that the defendants had sold a quantity of oil and the buyers had made sub-sales to the plaintiff of various quantities, to whom they gave delivery orders, addressed to the defendants and directing them to deliver to the plaintiff the quantities mentioned therein, "ex our contract." The plaintiff presented orders of this kind to the defendants, who either sent word they were in order, or received them without comment. So long as the defendants' vendees kept up their payments, the orders were honoured, but they having fallen into default, the defendants refused to make any further deliveries, and the judge held they were within their rights.

**DIVIDEND—PAYMENT OF DIVIDEND BY WARRANT—LOSS OF DIVIDEND WARRANT—RIGHT TO SUE FOR DIVIDEND—INDEMNITY—PAYMENT.**

*Thairwall v. The Great Northern Ry.* (1910) 2 K.B. 509. This was an action by a shareholder against a limited company to recover the amount of a dividend due to the plaintiff. It appeared that a dividend had been declared to which the plaintiff as a shareholder was entitled, and that it had been ordered by the directors to be paid by warrant; and that a warrant for the amount the plaintiff was entitled had been sent by post to his registered address, but had been lost in transit. On these facts being brought to the defendants' attention they offered to issue a new warrant on the plaintiff giving them indemnity against any claims on the lost warrant, this the plaintiff refused to do. The County Court judge, who tried the action, gave judgment for the plaintiff, but the Divisional Court (Bray and Coleridge, JJ.) held that the position the defendants had taken was correct, and that the plaintiff's only remedy was as upon a lost bill of exchange; and that the warrant was in effect a bill of exchange notwithstanding a provision that it would not be honoured three months after the date of issue unless specially indorsed by the secretary.

**CONTRACT—STATUTE OF FRAUDS, S. 4, (R.S.O., c. 338, s. 5)—AGREEMENT NOT TO BE PERFORMED WITHIN A YEAR—POSSIBLE PERFORMANCE WITHIN A YEAR.**

*Reeve v. Jennings* (1910) 2 K.B. 522. In this case in April, 1908, the defendant entered the service of the plaintiff, a dairy-

man, under a verbal agreement that the employment might be determined by either party on one week's notice, and that the defendant should not within 36 months after quitting the plaintiff's service carry on the business of a dairyman within a specified area. On 6 February, 1910, the defendant quitted the plaintiff's service and immediately set up the business of a dairyman within the prohibited area, and this action was brought to restrain him from continuing such business. The judge of the County Court, who tried the action, gave judgment for the plaintiff holding that the fourth section of the Statute of Frauds did not apply. But the Divisional Court (Bray and Coleridge, JJ.) reversed his decision, holding that it did, because while it was true the plaintiff might perform his part of the contract within a year, it was clear that the defendant could not perform his contract for at least three years after the employment was determined, no matter when it was determined. From the judgment of the Divisional Court it would appear that this precise point had not been previously covered by decision.

#### JURISDICTION TO GRANT NEW TRIAL—JUDICIAL DISCRETION.

*Brown v. Dean* (1910) A.C. 373. In this case the House of Lords (Lord Loreburn, L.C., and Lords Atkinson, Shaw and Mersey) hold, that where a statute gives a County Court judge discretion to grant a new trial in a case tried before him, the discretion is a judicial and not an arbitrary discretion, and must be exercised according to the rules binding on the High Court in similar cases.

DENTIST—UNREGISTERED PERSON—HOLDING OUT AS PERSON  
“SPECIALY QUALIFIED TO PRACTICE DENTISTRY”—DENTISTS’  
ACT, 1878 (42-43 VICT. c. 33) s. 3—(R.S.O. c. 178, s. 26).

*Bellerby v. Heyworth* (1910) A.C. 377. This was an appeal from the decision of the Court of Appeal (1909) 2 Ch. 23 (noted ante, vol. 45, p. 563). The House of Lords (Lord Loreburn, L.C., and Lords James, Atkinson, Shaw and Mersey) have affirmed the judgment of the court below, and hold that the words “specially qualified to practice dentistry” in section 3 of the Dentists’ Act, 1878, refer to the qualification by diploma, certificate, or other hall mark, and not to competence or skill. Consequently that the advertising by an unregistered person “finest artificial teeth, painless extraction, advice free” is not a breach of the Act. (See R.S.O. c. 178, s. 26.) The decision in *Barnes v. Brown* (1909) 1 K.B. 38 is overruled.

**MINES—OVERLYING AND UNDERLYING SEAMS OF COAL—SUBSIDENCE  
—RIGHT TO SUPPORT—EVIDENCE—NECESSARY IMPLICATION.**

*Butterley Coal Co. v. New Hucknall Colliery Co.* (1910) A.C. 381. This was an appeal from the judgment of the Court of Appeal (1909) 1 Ch. 37 (noted ante, vol. 45, p. 122). The plaintiffs were lessees of a seam of coal, the lease containing a reservation to the lessor and his assigns of a right to work the mines under the plaintiffs' seam subject to provisions for indemnifying the plaintiffs against any physical damage which might thereby be occasioned. The lessor having leased to the defendants a seam of coal lying 174 yards under the plaintiffs' seam they in working the seam had caused a subsidence in the plaintiffs' seam which occasioned no physical damage to the plaintiffs' coal, but rendered it more difficult to mine. The plaintiffs claimed an injunction, but the Court of Appeal dismissed the action, and the House of Lords (Lord Halsbury, Macnaghten, Atkinson, and Collins) have affirmed the judgment, holding that under the lease there was an implied power to the lessor and his assigns to cause subsidence.

**ADMIRALTY—COLLISION—NEGLIGENCE OF DEFENDANTS' SERVANT  
CAUSING ORIGINAL DAMAGE—NEGLIGENCE OF PLAINTIFFS' SER-  
VANT CAUSING ADDITIONAL DAMAGE—SERVANT ACTING IN DUAL  
CAPACITY—CONSEQUENTIAL DAMAGE.**

*Grant v. S.S. Egyptian* (1910) A.C. 400. This was an appeal from the decision of the Court of Appeal (1910) P. 38 (noted ante, p. 161). The case was simple. A. acting as the defendants' servant caused a collision whereby the plaintiffs' vessel was injured, but owing to the negligence of A. acting as the plaintiffs' servant, the plaintiffs' vessel sank which but for A's. negligence it would not have done. The Court of Appeal held that for the additional damage caused by A. when acting as the plaintiffs' servant, the defendants were not liable; and the House of Lords (Lord Loreburn, L.C., and Lords James, Atkinson, Shaw, and Mersey) have affirmed the judgment.

**MONEY LENDER—BUSINESS CARRIED ON AT OTHER THAN RE-  
GISTERED ADDRESS—LOAN MADE AT BORROWERS' HOUSE—  
MONEY LENDERS' ACT. 1900 (63-64 VICT. c. 51) s. 2, SUB.-S.  
1 (b).**

*Kirkwood v. Gadd* (1910) A.C. 422. This was an action brought to restrain the defendant from enforcing a bill of sale

given in the following circumstances. The defendant was a money lender having a duly registered address as required by the Act of 1900. An agent of the plaintiff wrote to him at this address stating that the plaintiff desired a loan on the security of a bill of sale of his furniture; the defendant thereupon sent his servant to the plaintiffs' residence, and he drew up the bill of sale and got it executed and thereupon advanced the money. The plaintiff contended that this was a breach of the Act which requires the defendant to carry on business at his registered address and no other. The Court of Appeal held that it was, and granted an interim injunction. The House of Lords (Lord Loreburn, L.C., and Lords James, Atkinson, Shaw and Mersey) considered that whether or not it was a breach of the Act was to a large extent a question of fact to be determined in each case on its own special circumstances, and that on the evidence in this case, no breach of the Act appeared to have been committed, and therefore the interim injunction ought not to have been granted.

**COMPANY—BOND—CONSTRUCTION—BONUS PAYABLE OUT OF PROFITS—ISSUE OF PAID-UP SHARES IN SATISFACTION OF BONUS—DIVIDENDS OUT OF CAPITAL—ISSUE OF SHARES WITHOUT CONSIDERATION—WANT OF CONSIDERATION—ULTRA VIRES.**

*Famatina Development Corporation v. Bury* (1910) A.C. 439. This was an appeal from the judgment of the Court of Appeal (1909) 1 Ch. 754 (noted ante, vol. 45, p. 477). The facts were that the defendant corporation (the appellants) had issued £10 bonds to the amount of £50,000 repayable in seven years with a bonus of £25 per bond, the principal and bonus to be paid exclusively out of the profits. These bonds were subsequently exchanged for first mortgage debentures, but this was not to affect the bonus. No profits had been earned and it was proposed by the defendant corporation in 1909, to issue paid-up shares in satisfaction of the claims for the £25 bonus, and the present action was brought to restrain the carrying out of that arrangement. The Court of Appeal held that there was nothing in the bonds authorizing the company to turn a contingent liability on income into a present liability on capital, and that the proposed arrangement was ultra vires as being equivalent to paying dividends out of capital and issuing paid-up shares without consideration. The House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, Ashbourne and Collins) affirmed the judgment and for the same reasons.

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**APPEAL—COURT BELOW DRAWING WRONG INFERENCE FROM ADMITTED FACTS—REVERSAL OF JUDGMENT ON FACTS.**

*Draupner v. Draupner* (1910) A.C. 450. This was an appeal from the judgment of the Court of Appeal in *The Draupner* (1909) P. 219. The House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, Atkinson and Shaw), without determining any point of law, reversed the judgment on the ground that the Court below had drawn the wrong inference from the admitted facts.

**LIBEL—DISCOVERY—DOCUMENTS REFERRED TO IN DOCUMENTS PRODUCED—FURTHER AFFIDAVIT OF DOCUMENTS—PRODUCTION OF DOCUMENTS.**

*Kent Coal Concessions v. Duguid* (1910) A.C. 452. The House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, James, Atkinson, and Shaw) have affirmed the judgment of the Court of Appeal in this (1910) 1 K.B. 904 (noted ante, p. 445), on the ground that the order complained of was discretionary and it was not shewn that the court below had gone upon any wrong principle.

**PARTNERSHIP—PROVISION FOR PURCHASE BY SURVIVING PARTNER OF SHARE OF DECEASED PARTNER—SURVIVING PARTNER SOLE EXECUTOR OF DECEASED PARTNER—VALUATION OF SHARE—VALIDITY OF PURCHASE.**

*Horden v. Horden* (1910) A.C. 465 was an appeal from the Supreme Court of New South Wales. The facts of the case were that by articles of partnership between two brothers it was provided that on the death of either, the surviving partner should pay to the executors of the deceased the full share to which the deceased was entitled on taking an account of the partnership assets "such stock and other assets as shall not consist of money to be valued either by mutual agreement or valuation in the usual way, nothing being charged for good will." One partner died in 1886 leaving his co-partner his sole executor who effected the valuation as directed and paid for the share as surviving partner, and thenceforth carried on the business on his own account. In 1908 the residuary legatees of the deceased partner instituted this action against the surviving partner claiming that there had been no operative sale and purchase by reason of the valuation not having been made in the manner authorized, and

that the business must be deemed to have been carried on for the benefit of both parties to the suit. The court below had directed an account to ascertain whether or not the valuation arrived at in 1886 was the true value of the share and, if not, what was the proper value thereof. The plaintiffs contended that the sale was bad because the defendant purported to buy from himself as his brother's sole executor and that the valuation was improperly made. The Judicial Committee of the Privy Council (Lords Macnaghten, Collins and Shaw and Sir A. Wilson) however dismissed the appeal, holding that the contract of sale was binding, and that the valuation was only an incident in carrying it out, and that the evidence shewed that a substantially accurate method had been adopted, but even if there were error, that would be corrected by the court on its being clearly and conclusively proved, and that the appellants could not object to the dual character of the defendant which had been imposed on him by their own testator.

CIVIL SERVICE — SUPERANNUATION — PERMANENT OFFICER DISCHARGING TEMPORARY DUTIES IN ANOTHER CAPACITY.

*Williams v. Macharg* (1910) A.C. 476 was an appeal from the High Court of Australia. The plaintiff was a public civil servant and under a statute was entitled to a superannuation allowance. On his appointment he was styled a "temporary draftsman," but the office was permanent and he continued in it being subsequently styled "assistant draftsman" until his retirement, and the question was whether the time he was styled "temporary draftsman" was to be reckoned in his period of service for the purpose of computing the allowance, the Act providing that it was not to apply to persons "employed temporarily." The court below held that it was to be reckoned, and the Judicial Committee of the Privy Council (Lords Macnaghten, Collins and Shaw and Sir A. Wilson) affirmed the decision.

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REPORTS AND NOTES OF CASES.

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## Province of Ontario.

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HIGH COURT OF JUSTICE

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Middleton, J.]

REX v. COOTE.

[Sept. 10.

*Liquor License Act—Conviction for second offence in absence of defendant—Enquiry as to first offence—Statute, directory or imperative.*

Motion to discharge the defendant from custody on a return to a habeas corpus. The question was as to the power of the magistrate to proceed with the trial of the defendant in his absence, he being charged with an offence against the Liquor License Act, as a second offence. Reference was made to the Liquor License Act, s. 101; Crim. Code, ss. 718, 721; R.S.O. 1897, c. 90, s. 2; 10 Edw. VII. c. 37, s. 4.

*Held*, that the provisions of the Act requiring the trial of the subsequent offence to precede the inquiry as to the former conviction are imperative and not directory, has been determined in *Rex v. Nurse*, 7 O.L.R. 418, which overrules an earlier case of *Regina v. Brown*, 16 O.R. 41, in which Armour, C.J., had held the provisions to be directory only. This case accepts the reasoning of the court in Nova Scotia in *Rex v. Salter*, 20 N.S.R. 206, which determined that the provisions of the clause relating to the asking of the accused whether he admitted or denied the previous conviction were imperative. I can see no ground for distinguishing between the different provisions of this section, and holding some to be imperative and others directory, and, even if I am not technically bound by the decisions, I have no hesitation in accepting them. The Nova Scotia case is upon the precise question now before me, and determines that the magistrate has no power to convict of a second offence without bringing the defendant before him, so that the course pointed out by the section in question can be strictly followed. The view of the majority of the court in *Ex p. Grover*, 23 N.B.R. 38, 24 N.B.R. 57, does not commend itself to me. I cannot see why the bringing of the accused before the magistrate on a warrant before proceeding with the trial should be regarded as a "defeating of the ends of justice," or as practically preventing the making of a conviction for a second offence. On the other hand, to read into s. 101

of the Liquor License Act the words found in s. 721 of the Criminal Code, "If the defendant is personally present at the hearing," would be legislation rather than interpretation. There does not seem to be any good reason for the requirements of s. 101, but this is a matter for the legislature, and not for the courts.

*Haverson, K.C.*, for defendant. *Bayly, K.C.*, for Crown.

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Middleton, J.]

[Sept. 16.

NATURAL RESOURCES SECURITY CO. v. SATURDAY NIGHT, LTD.

*Libel—Interim injunction restraining publication.*

Motion by plaintiff for an interim publication restraining the publication of libels generally.

*Held*, that the most that can be asked is to restrain the further publication of particular libels. The decision on the section of the Judicature Act applicable herein defines the exceptional cases in which such relief should be granted and this case is outside them. The test prescribed may be seen in *Coulson v. Coulson* (1887) 3 Times L.R. 846; *Bonnard v. Perriman* (1891) 2 Ch. 269; *Monson v. Tussauds, Limited* (1894) 1 Q.B. 671. The context shews that this means that the court must be clearly satisfied that the defence of justification must fail, not merely that the article is defamatory if untrue.

*Glyn Osler*, for plaintiffs. *G. M. Clark*, for defendants.

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Middleton, J.]

COLVILLE v. SMALL.

[Sept. 19.

*Action by assignee in trust — Absolute assignment — Adding assignees as plaintiffs—Pleading—Champerty.*

Appeal by plaintiff from an order of a local judge directing that the assignors of the plaintiff should be added as parties plaintiff. The order was made at the instance of the defendant. The plaintiff opposed it, relying upon his own title under the assignment which was absolute in form. The assignee was the trustee to divide the proceeds of the litigation between himself and his assignors.

*Held*, 1. Where an assignment is absolute in form it is immaterial that the assignee holds in trust or that the assignee has been officially interested: *Comfort v. Betts* (1891) 1 Q.B. 737. The order was wrong in requiring the addition of the assignors as plaintiffs.

2. If the defendant desires to contend that by reason of the plaintiff having an interest in the proceeds of the litigation the assignment is champertous and this defence should be pleaded and raised at the hearing.

*McClemont*, for plaintiff. *Counsell*, for defendant.

## Province of British Columbia.

### SUPREME COURT.

Clement, J.]

[Sept. 16.

**SEMI-READY, LIMITED v. SEMI-READY, LIMITED.**

*Companies—Dominion and provincial—Legislation affecting—Companies incorporated with same trade name—Injunction.*

Where plaintiff company had obtained incorporation under the Dominion Companies Act for a special purpose and with a special trade name, a company formed under the Provincial Act for similar purposes and with the same name, was restrained from operating under such name.

*Jackson*, for plaintiffs. *Killam*, for defendants.

Gregory, J.]

**IN RE LEE HIM.**

[Sept. 27.

*Statute, construction of—Chinese immigration—Exemption from entry tax—Onus on applicant—Appeal from decision of controller of customs—Habeas corpus—Mandamus.*

The Chinese Immigration Act, s. 7, imposes an entry tax upon all immigrants of Chinese origin coming into Canada, but by sub-s. (c) exempts merchants and certain other persons, who are required to substantiate their status to the satisfaction of the controller of customs, subject to the approval of the Minister of Customs.

*Held*, that an applicant dissatisfied with the controller's decision, should proceed by way of appeal to the Minister of Customs, and that if it should ultimately become necessary to apply to the court for assistance the proceeding should be by mandamus and not by habeas corpus.

*Farris*, for the application. *Senkler*, K.C., contra.

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Hunter, C.J.]            *CROSSLEY v. SCANLAN.*            [Sept. 28.

*Mining law—Location—Survey post used as No. 1 post—Omission of surveyor's signature on plan—Leave to add signature.*

The location of a mineral claim is not invalid merely because an old survey post is used by the locator as his No. 1 post if the facts bring the locator within the benefit of sub-s. (g), of s. 16, of the Mineral Act as amended in 1898.

Leave was given to amend a plan by attaching the signature of the surveyor.

*Lennie and Wragge*, for plaintiffs. *S. S. Taylor*, K.C., for defendants.

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### Book Reviews.

*Notes on the Remedies of Vendors and Purchasers of Real Estate.*

By C. C. McCaul, B.A., K.C., of Osgoode Hall, and of the Bar of Alberta and Saskatchewan and British Columbia. Toronto: Carswell Company, Limited. 1910.

As the author tells us, these notes grew out of an attempt to condense within the compass of a magazine article the subject of relief against forfeiture; but he evidently saw, as cannot be gainsaid, that there was too much preliminary ground to cover to permit the accomplishment of this, in view of the necessity to get a clear understanding of the principles relating to the various remedies available to vendors or purchasers on a breach of contract. The book as it stands has a special reference to Instalment plan agreements, Rescission, Determination, Relief against forfeiture, etc., etc. He modestly says that it does not profess to be a text-book; but it may certainly claim the honour of being a text-book and a very good one indeed; and we cordially commend to the attention of our readers. Chapter I. is introductory. II. Vendors' remedies—Contract affirmed. III. Vendors' remedies—Contract disaffirmed. IV. Vendors' remedies—Special stipulations. V. Determination apart from special stipulation. VI. Purchasers' remedies. VII. Notice—Waiver—Delay. VIII. Election of remedies. Whilst, as he says, it is necessary in dealing with such subjects to have at hand Dart, Williams or Fry, it is also most desirable, having these, to have also Mr. McCaul's collection of essays on the above subjects.

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*The Elements of Jurisprudence.* By THOMAS ERSKINE HOLLAND, K.C., of Lincoln's Inn, Chichele Professor of International Law and Diplomacy, D.C.L., and Fellow of All Souls' College, Oxford, etc., etc. 11th edition. Oxford: Clarendon Press. London and New York: Henry Froude; also sold by Stevens & Sons, 119 and 120 Chancery Lane, London.

The first edition of this standard work was published in 1880. Nine other editions have been published from time to time since then, and now this year still another is called for. It has received careful revision, with a view as far as may be to note the improvement of legal theory and practice in all countries claiming any legal system to control its domestic governmental relations. We need say no more about a work of world-wide reputation.

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## Bench and Bar.

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### JUDICIAL APPOINTMENTS.

His Honour George Hedley Vicars Bulyea, of the City of Edmonton, in the Province of Alberta, to be the Lieutenant-Governor of the Province of Alberta. (Oct. 5.)

George William Brown of the City of Regina, in the Province of Saskatchewan, Esquire, Barrister-at-law, to be the Lieutenant-Governor of the Province of Saskatchewan. (Oct. 5.)

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The *Living Age* is different from all other magazines in that it collects together the best thoughts and the thoughts best expressed in all the magazines and reviews of any value in the Anglo-Saxon world. There is so much froth in literature nowadays and the enticement to waste one's time upon it so strong that it is well to have such a collection as appears in this magazine to draw one's attention to the more solid and instructive literature that is obtainable. We strongly recommend this periodical to the attention of our readers. It is issued weekly at a very moderate price and should be in the hands of all those who aspire to be au fait with the best modern literature. (Boston, U.S.A.)

## United States Decisions.

**MEASURE OF DAMAGES FOR RIGHT OF WAY FOR TELEGRAPH OR TELEPHONE LINE.**—Although there is a conflict, the weight of authority apparently sustains the right of an abutting property owner to compensation where telegraph or telephone poles and wires are placed upon a public street or highway, as an additional servitude is created. The measure of damages when an abutting owner is entitled to compensation is held in *Illinois Telegraph News Co. v. Meine*, 242 Ill. 568, 90 N.E. 230, to be the value of the land occupied by the poles, and the amount of decrease in the value of the land between the poles, owing to the right of the company to use it jointly with the property owner for stringing and maintaining the wires. The decisions discussing the measure of damages appropriate in such cases are presented in a note appended to the *Meine* case in 26 L.R.A. (N.S.) 189.

**CLOSING HIGHWAY AGAINST AUTOMOBILES.**—The recent Maine case of *State v. Mayo*, 75 Atl. 295, is authority for the proposition that the legislature may, without impairing the constitutional right to equal protection of the laws, or the right of pursuing happiness, authorize a municipal corporation to close to automobiles dangerous streets, the use of which by such machines may endanger the lives of their occupants or of those driving horses upon the streets. The case also determines that an ordinance forbidding the use of automobiles on highways constructed over deep ravines and along the edges of cliffs, to protect the lives of the occupants of such vehicles and of those attempting to use horses along the roads, is reasonable. The decision is accompanied in 26 L.R.A. (N.S.) 602, by a note upon the power to prohibit the use of automobiles upon public thoroughfares, which is supplementary to an earlier note to *Christy v. Elliott*, 1 L.R.A. (N.S.) 221.

**DUTY OF CARRIER TO ACCEPT SICK OR DISABLED PASSENGER.**—The question of the duty of a common carrier to accept a physically or mentally disabled person as a passenger is presented in the recent Massachusetts case of *Connors v. Cunard Steamship Co.*, 90 N.E. 601, holding that a common carrier is bound to accept as a passenger one who is ill, provided it can furnish the necessary accommodations, and the passenger is willing to pay for what he demands. But, as appears by the note which accom-

panies this case in 26 L.R.A. (N.S.) 171, the right of sick and decrepit persons to be transported is not unlimited. Nor can a carrier be compelled to accept an unattended insane person or an intoxicated person as a passenger. On the other hand, however, it is not justified in refusing to accept an individual as a passenger upon the sole ground that he is blind.

**HARNESS AS "WAYS, WORKS, AND MACHINERY."**—The recent Massachusetts case of *Murphy v. O'Neil*, 90 N.E. 406, 26 L.R.A. (N.S.) 146, holding that the harness used in connection with a merchant's delivery is not part of the "ways, works, and machinery," within the meaning of a statute making him liable for injuries to a servant for defects therein, the same as to strangers, seems to be one of first impression.

**LIABILITY OF MUNICIPAL CORPORATION FOR TORT IN CONNECTION WITH PROPERTY USED BY IT.**—The question whether a municipal corporation may be made to respond in damages for a tort, either of misfeasance or nonfeasance, in connection with a particular department of municipal activity, depends, according to the weight of authority, upon the question whether the duties of that department pertain to the public or to the private functions of the municipality; and the same criterion applies to the liability of a municipality for torts in connection with buildings used by it. This view is confirmed by the recent Kentucky case of *Columbia Finance & T. Co. v. Louisville*, 122 S.W. 860, holding that a municipal corporation is not liable for the negligence of one operating an elevator in the city hall, which is erected and maintained for the transaction of its public affairs. The case is accompanied in 25 L.R.A. (N.S.) 88, by a note discussing the considerable body of case law pertaining to the subject.

A similar question arose in *Libby v. Portland*, 105 Me. 370, 74 Atl. 805, 26 L.R.A. (N.S.) 141, in which it is held that a municipal corporation which rightfully attempts to operate, for its own benefit, a farm within its limits, is liable for injury to one rightfully on the premises, through a step which it negligently permits to become out of repair.

**CIVIL LIABILITY FOR NEGLIGENT USE OF FIREARMS.**—The law undoubtedly requires a very high degree of care from all persons using firearms in the immediate vicinity of others, no matter how lawful or innocent such use may be. It was held in the recent case of *Rudd v. Byrnes*, 156 Cal. 636, 105 Pac. 957, 26 L.R.A. (N.S.) 134, that a member of a party of hunters is

negligent as matter of law in firing at an object moving through bushes which conceal it, without taking time to discover what it is, which results in his hitting a member of the party. A discussion of the earlier cases on this subject may be found in a note accompanying the case of *Siefker v. Paysee*, 4 L.R.A. (N.S.) 119.

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## Flotsam and Jetsam.

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### THE SKY LAWYER.

In the development of the professions marching on with the progress of invention, the aeroplane lawyer is about to appear.

Men seeking mastery of the air are invading the United States Patent Office, and, at the present rate of productivity in aeronautic ideas, it is predicted that the volume of litigation which will soon follow will be incalculable. There are now more than 140 applicants for patents relating to the single point of automatic balance for air craft. In addition there are hundreds of applications for patents for motors, planes, propellers, skids, and other essentials in air navigation.

"From the present outlook," a patent lawyer said recently, "we will soon have in this country a new crop of aeroplane lawyers, men who have specialized in the law of the air, and who keep track of the hundreds of aeroplane patents that probably will be granted."

"Just as there are lawyers," says the *Lincoln Nebraska Journal*, "who become especially learned in the regulations governing the high seas, so there will be men before long making a specialty of the laws governing the skies. A conference of jurists from the various nations has been held at Paris at different times during the last six months, for the purpose of considering the rights of people who use the skies, and also the rights of people who own land under them. It will require a long time to work out an adequate system of international law governing such matters, but a start has been made by an agreement that 'the air over inhabited states, including the 3-mile limit of the sea, is free, subject to the right of the state over which the air space exists to take any proper and necessary steps for the national protection and for the protection of the private rights of its inhabitants.' An aviator flying over a foreign country would under this arrangement be subject to the laws of that

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country only in so far as his conduct affects the rights of the people or the security of the government. All events happening in the balloon which do not touch those rights would be subject to the jurisdiction of the country to which the aerostat belonged. This is applying, so far as it can be done, the principles underlying the admiralty laws. The details must be worked out as experience shows more laws to be necessary. In the course of the next twenty-five years, the law of the sky will be an important branch of the international legal regulations."—*Case and Comment.*

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A very ingenious defence, says the *Westminster Gazette*, was raised at Watford, on July 5th, by a solicitor defending a motorist who was summoned for driving negligently. The defendant fell asleep whilst driving over Bushey Heath, and woke up to find that he had smashed into a fence. This, pleaded the solicitor, was not negligence, because sleep is an act of God just as lightning is in the eye of the law. A man does not, of course, encourage sleep deliberately when he is driving a car, and there is something in the argument that if sleep overcomes him it is not a voluntary act, but the *Westminster Gazette* fancies it would not avail a sentry found asleep at his post to plead that he had been suddenly struck by sleep and was therefore not responsible. In the case in question a fine was inflicted, but a case is to be stated, and the arguments used on appeal will be interesting to note. Poets have rhapsodized a good deal over "gentle sleep," and it is rather a shock to poetic sentiment to have it argued that sleep is analogous to being struck by lightning.—*Law Notes (Eng.)*

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Lycurgus and Solon inscribed their laws, as they imagined, for endless durability, and Justinian prepared his Pandects for universal application; but the common law of England has proved the basis of a superstructure beneath whose shadow all other systems have dwarfed, and abandoned their hold on human affairs.—*Daniel W. Voorhees.*

# Canada Law Journal.

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## *A NATION'S FOUNDATIONS.*

The impartial and prompt administration of wise and righteous laws makes largely for the welfare of a nation; but to obtain the best and most lasting results we must go further back. Our King (God save the King!) struck the keynote when he said on a recent occasion—"The foundations of national glory are set in the homes of the people. They will only remain unshaken while the family life of our race and nation is strong, simple and pure." No words of ours could add anything to this expression of profound wisdom and highest statesmanship. Built upon such a foundation stone Britain can stand "four square to all winds that blow."

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## *DIVORCE IN CANADA.*

Prior to the Reformation the jurisdiction over marriage and divorce in England was exclusively vested in the ecclesiastical courts, and marriages could in no circumstances be dissolved except by the decree of the court Christian; and up to the time of the Reformation absolute divorces, even on the ground of adultery, were never granted; the only kind of divorce granted being a divorce from bed and board a mensa et thora, as it was called. De facto marriages were dissolved or annulled, where they had been contracted in circumstances which rendered them void ab initio, as, for instance, physical inability existing at the time of the marriage, or where the relationship of the parties disqualified them from marriage with each other, etc. Henry VIII.'s claim to a divorce was on the latter ground, and although styled "a divorce" it was in truth a claim to have his marriage with his deceased brother's wife declared a nullity.

Popes assumed the power to allow marriages within prohibited degrees, and also to dissolve them; but there seems to have been a general opinion that this power of Papal dispensation only extended to prohibitions imposed by ecclesiastical authority and did not extend to the prohibitions of the Levitical law, and although Henry VIII.'s marriage with his deceased brother's wife had been contracted under a Papal dispensation, it was by some theologians considered that the dispensation was invalid and beyond the power of a Pope to grant. Be that as it may, that was a divorce case fraught with most momentous consequences.

Since that celebrated case, opinion on the subject of divorce has undergone a great change in England. By the denial of Papal supremacy and the forbidding of all appeals to Rome, England was left without any recognized judicature for absolutely dissolving marriages. The courts Christian there continued after the Reformation to exercise the same limited jurisdiction they had done before the Reformation, they granted divorces from bed and board, but in no case an absolute divorce; and they continued to grant decrees of nullity of marriage in cases only where they were tainted with some imperfection which rendered them void ab initio.

In this condition of affairs Parliament began to make Acts of Parliament dissolving marriages absolutely and giving power to the divorcees to marry other people. This, however, was an expensive luxury available only by the rich, and had usually to be preceded by an action of crim. con., in which the guilt of one of the parties to the marriage would be established before a jury. As for the poor, their only remedy was to take the law into their own hands and commit bigamy, with the chance of a criminal prosecution. This inequality of the law was graphically described by Maule, J., in his humourous address to some poor bigamist convicted before him.

After existing for about three centuries this anomalous condition of affairs was put an end to, or at all events to some extent alleviated, by the establishment of a purely secular divorce

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court in England during the last century. This court, now a branch of the High Court of Justice, is empowered to grant absolute divorces, and divorcees are by statute permitted to marry other persons.

In Canada some of the provinces had prior to Confederation established provincial divorce courts which were continued in existence after Confederation, although by the British North America Act the jurisdiction over marriage and divorce is vested in the Dominion Parliament. Up to the present time that Parliament has established no court with power to grant divorces, but the Parliament of Canada assumes a Parliamentary jurisdiction to grant absolute divorces and to give to the divorcees power to marry other persons, similar to that exercised by the English Parliament prior to the establishment of the English Divorce Court.

It is somewhat to be feared that the divorce habit is growing in Canada. We have to the south of us an example of what may happen, and it is surely an example which for the moral welfare of our country we should avoid rather than follow.

The indissolubility of the marriage tie is to this day the doctrine of the greater part of the Christian Church, and when temporal rulers refuse to give coercive effect to that doctrine a conflict arises between Church and State which is to be regretted. The disposition to do that which the temporal law allows is strong, when it is also the dictate of inclination, even though it be an act which the Christian Church, as the exponent of the divine law, adjudges to be an offence against that law; and people are apt to think that because a temporal legislature permits a violation of the Christian law of marriage, that because such violation is followed by no temporal disability it ceases to have any moral effect; but, of course, temporal legislatures, whatever they may assume to do, have no power to repeal divine laws.

This is a view of the matter which is not properly appreciated, but it is none the less true. A temporal legislature might do away with all temporal penalties for theft or any other im-

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moral act, but theft would not cease to be immoral or contrary to the law of God which the Christian Church is bound to teach and maintain, even though temporal rulers may refuse any help of a coercive nature to compel its observance.

Looking through the Dominion statutes for the years 1907, 1908, 1909 and 1910, we gather the following results:—

In 1907 five divorces were granted—four on the application of the husband, and one on the application of a wife. Three applications were from Ontario, one from Quebec, and one from Manitoba.

In 1908 seven divorces were granted—two on the application of husbands, and five on the application of wives. Six applications were from Ontario, and one from Saskatchewan.

In 1909 fourteen divorces were granted—eight on the application of husbands, and six on the application of wives. Seven applications were from Ontario, three from Quebec, two from Saskatchewan, and two from Manitoba.

In 1910 twenty divorces were granted—twelve on the application of husbands, and eight on the application of wives. Fourteen applications were from Ontario, three from Manitoba, two from Quebec and one from Saskatchewan.

In each year the Province of Quebec occupies the honourable position of furnishing the fewest number of divorces in proportion to its population. The steady growth of applications from Ontario is not a very creditable thing to that province.

These statistics do not cover all the divorces granted in Canada, because, as we have said, in some of the provinces provincial divorce courts, deriving their origin from pre-Confederation days still exist, but probably the total number of divorces granted by those courts would not add very materially to the above list.

G. S. H.

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The views expressed in the above article are those generally held by the ecclesiastical authorities of the Church of England, and still more strongly by those of the Church of Rome. There are no questions connected with our social system more important than those relating to marriage and divorce, and there are

none with which, in the present state of society, it is so difficult to deal.

Those who regard marriage merely as a social contract which may, at any time, be set aside in order to suit the inclination or convenience of the parties, are troubled with no scruples on the subject, and feel no difficulty as to the method of dealing with it. Happily, however, such is not the view taken by the people of this country generally. In practice, at any rate, the religious character of the contract is recognized, and the sanctity of the marriage tie accepted as something which admits of no question.

The extreme view of the indissoluble nature of the marriage contract is, however, not held by all of those who still regard it as of a religious character. Adultery proved against either party would by them be held as good ground for divorce, having also the sanction of Scripture. For instance, when a Divorce Act was sent to the House of Commons from the Senate, the Roman Catholic members voted against it, no matter what the merits of the case might be, while the Protestant members supported it if the action was based upon proved acts of adultery, and there was no evidence of collusion.

The difficult question is, how can any change be made in the present system without causing a gradual loosening of the marriage tie. There can be no doubt, as all enquiry has shewn, that the greater the facilities there are for obtaining divorce, the more numerous will be the demands for it. On the other hand the difficulty of getting a divorce will give time for reflection, it may be for repentance, and thus prevent a separation which would otherwise be inevitable.

But, it will be said, if there are cases when a divorce should be granted the way to obtain it should be open to all—rich and poor alike. In this country, wherever no provincial courts exist, the only proceedings by which a divorce can be obtained are so costly as to be beyond the reach of a poor man—which is a manifest injustice. Considering, however, the frightful results which have elsewhere followed the plan of easy divorces, one might be tempted to say—better submit to the injustice than give

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greater facilities for remedying it. It says much indeed, for the moral character of our people, and their respect for the institution of marriage, that there is not, and never has been, such a demand for the relief which a divorce court would give as to compel public attention, and demand legislative action. Till such a demand does arise it may be the part of wisdom to submit to evils of which we know the existence, rather than hasten to apply remedies which we know will not effect a perfect cure.

This may seem a very lame and impotent conclusion, but let us in our defence recapitulate the conditions before us, and the difficulties by which the subject is surrounded: (1) The very strong view of the indissoluble nature of the marriage tie held by all our Roman Catholic fellow subjects, and by many Anglicans and other Protestants, a view entirely opposed to any relaxation of the existing law. (2) The respect for the religious character of the marriage ceremony held by people generally, and their aversion to anything that would lessen the respect in which it is held. (3) The injustice of a system which gives to the rich what it refuses to the poor, for that is the practical result of the present condition of things. (4) The admitted danger to the morals of the community, to the purity of domestic life, to the happiness of the home and welfare of the children; certain to follow from giving undue facilities for divorce. (5) The object lesson in the results, which can only be described as revolting, of the system now prevailing in the country to the south of us.

With all these considerations before us should not our maxim be, *Quieta non movere.*

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Whilst the proud boast of British justice is that it has the same law for the poor as for the rich, there are some cases where the boast becomes a farce. This was well put by Mr. Justice Maule when passing sentence on a prisoner convicted of bigamy. When asked why judgment should not be passed upon him he excused himself by saying that his wife had run away with a hawker five years before, and he had never heard from her since, and that he had only recently married his so-called second wife.

The keen irony of the celebrated judge above referred to appears in his remarks, which were as follows:—

“I will tell you what you ought to have done; and if you say you did not know, I must tell you that the law conclusively presumes that you did. You ought to have instructed your attorney to bring an action against the hawker for damages. That would have cost you about a hundred pounds. When you had recovered substantial damages against the hawker, you would have instructed your proctor to sue in the ecclesiastical courts for a divorce a mensa et thoro. That would have cost you two or three hundred pounds more. When you had obtained a divorce a mensa et thoro, you would have had to appear by counsel before the House of Lords for a divorce a vinculo matrimonii. The bill might have been opposed in all its stages in both Houses of Parliament; and, altogether, you would have had to spend about a thousand or twelve hundred pounds. You will probably tell me that you never had a thousand farthings of your own in the world; but, prisoner, that makes no difference. Sitting here as a British judge, it is my duty to tell you that *this is not a country in which there is one law for the rich and another for the poor.*”

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#### OATHS BY TELEPHONE.

A recent case in the California Court of Appeals (*Fairbanks-Morse v. Getchell*, 110 Pac. 331), discusses telephoning an oath across a county line to a notary public out of the jurisdiction of the affiant, and holds that such an oath is void. The case assumes for the purpose of argument that an oath administered by means of a telephone would be valid if the affiant were in the same county as the notary when he makes it, as decided in a Texas case. We are not aware of any case in this country which decides the question as to whether an oath can be administered by telephone, but we should imagine that such a proceeding would be invalid. An affidavit cannot well be said to be “sworn before me,” etc., when the parties are miles apart, though they

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may recognize, or think they recognize, each other's voices. In cases of contract the rule may well be different. Whether the language we now quote from the *Central Law Journal* in reference to the above case is the effort of the editor of that excellent journal, or is an extract from the judgment of the Californian court we know not, but it is an oasis in the dry desert of legal literature which might appeal to some of those who agree with the thought expressed by one of our judges in this province who thinks (and to a certain extent we concur) that there is no reason why legal propositions and arguments should not be stated in language seeking some literary excellence, lightened occasionally by appropriate illustrations or gems of thought which others might perhaps think foreign to the dry atmosphere of a law court. We do not know what his views would be as to the following reference to the question at issue in the above case:—

“This is a curious kind of ubiquity. You talk to it at a distance and yet it is at your elbow. It identifies you by your voice, and immediately it puts in motion, at a distance, a physical agency wielding a pen and an official seal, guided there by the mentality it encases. This official essence floats around you in a sort of psychological way, and yet that physical agency is so much a part of itself that if it is destroyed this essence goes out of existence or perhaps is in suspended animation, until the physical agency's successor is found.”

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#### CHANGES IN ENGLISH JUDICIARY.

There have been several changes in the English Bench during the past few months. In August last Mr. Horace Edmund Avory, K.C., and Mr. Thomas Gardner Horridge, K.C., were appointed judges of the High Court of Justice, King's Bench Division. These two appointments were made under the Supreme Court of Judicature Act of 1910, and date from October 1st last. In September last Mr. John Eldon Banks, K.C., was appointed a judge of the High Court of Justice, King's Bench Division, in place of the late Mr. Justice Walton. In the same month Mr. Charles Montague Lush was appointed judge of the

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High Court, King's Bench Division, in the place of Mr. Justice Jelf, who resigned on account of ill-health. It must be gratifying to the English Bar as well as to the public to note that all these appointments, with possibly one exception, are said to be in every way excellent. Of one only (Mr. Justice Horridge) is it said that his political achievements were so great that they would not be allowed to go unrewarded. We have not always been in this country in the same happy position as they seem to be in England in the appointment of the best men at the Bar. Lord Collins last month resigned his position as one of the Lords of Appeal in Ordinary, the vacancy being filled by Sir William Robson, K.C., Attorney-General. Mr. Rufus Isaacs, K.C., perhaps the most prominent man at the English Bar, becomes Attorney-General, and Mr. J. A. Simon, K.C., Solicitor-General. A contemporary describes the rise of Mr. Simon as meteoric. Called to the Bar in 1899, and taking silk in 1908, he has now attained the position as one of the officers of the Crown at an unprecedented early age, at least in modern times, and, in the opinion of those best able to judge, his rise has been in accordance with his merits.

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It is worthy of note that both the law officers of the Crown are, if the evidence of their names is to be taken, of Hebrew descent. This is another illustration of the outstanding position taken by men of this wonderful race. Walter Besant says of them: "Poet, lawyer, painter, actor, statesman, physician, musician—there is not a branch of learning, art or science in which the Jew is not in the front rank."

It is said that the press of Europe is almost entirely under the control of Jews, and a large majority of the journalists there belong to that people. In Germany, although they are only two per cent. of the population, they hold more than one quarter of all the professors' chairs in the Universities and nearly ten per cent. of the judges in that country are Jews. In Breslau, which has about 57 lawyers, 31 of them are Jews. Their capacity for acquiring wealth is proverbial. It was pro-

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pheised 2,700 years ago that "the wealth of the Gentiles shall come unto them"; and now it is the fact that men of that race control the world's financial operations. It is said that Rothschild alone is worth some two thousand million dollars, and that nearly one half of the gold coinage of the world is held by Jews.

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The law courts were opened on the 12th October after the long vacation, with the usual observances. Special services attended by the judges and the Bar were held at Westminster Abbey, the Roman Catholic members of the Bench and Bar attending a special service at the Roman Catholic Cathedral. Afterwards there was the usual procession of judges to the law courts, and the presence of so many newly appointed judges attracted an unusually large crowd of spectators.

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#### **THE INFLUENCE OF BIBLICAL TEXTS ON ENGLISH LAW.**

##### **DEODANDS.**

There is an interesting article in the Pennsylvania University *Law Review* of last month on "The Influence of Biblical Texts upon the English Law." A perusal of this article shews the remarkable extent to which the contents of the old book have been incorporated into various branches of the law in various systems of jurisprudence. We have, however, no space to refer to this at any length, and the subject is academic rather than practical. One illustration given by the writer is the subject of deodands. The ancient rule was that any animate or inanimate thing that caused the death of a human being should be *deo dandum*, that is given to God, which in practice meant that the deadly thing, or its value, was handed over to the King, so that the price of blood should be at least theoretically, devoted to pious uses or objects of charity; and, it may be noted, that for centuries in every indictment for homicide the value of the weapon which caused the death was also stated.

The article continues as follows:—

“This rule is very ancient and most likely antedated the time when the Bible had any very great influence in shaping the law, but Lord Coke, followed by Blackstone, grounds it expressly upon the law of God as stated in Exodus 21: 28: ‘If an ox gore a man or a woman that they die, then the ox shall be surely stoned and his flesh shall not be eaten.’ It is a strange example of the persistence of ancient law that deodands were not abolished in England by statute until 1846. (9 & 10 Vict. c. 62.) It is, however, worthy of consideration whether modern conditions do not call for a revival of the law. If every automobile or trolley car, for instance, which causes the death of a man, woman or child, were forfeited by the owner, it is very likely that the number of accidents would suddenly decrease.

“A curious parallel with the law of deodands was drawn from the covenant with Noah in Genesis 9: 5: ‘And surely your blood of your lives will I require; at the hand of every beast will I require it, and at the hand of man’; and from the requirement that a homicidal animal should be put to death. These texts were considered by the mediæval Church as authority for the prosecution and punishment of delinquent animals. In France, Germany and other continental countries many curious indictments were preferred against rats, mice and other destructive vermin, as well as vicious animals who killed or injured men.”

#### GENERALLY.

On the general subject which introduces the foregoing, the articles concludes as follows:—

“The Bible as a law book has not received the careful study to which it is entitled. Its theological importance, and, in later times especially, its literary interest have absorbed the attention of its readers, but there are other aspects from which it should be studied. I have confined myself to a small part of its influence in specific cases upon the development of our own law; but the student of comparative law can find in this most accessible place a rich store of material, comparable only with those systems

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upon which Sir Henry Maine has thrown so much light. Thus Judge Sulzberger has written upon the Hebrew Parliament, and Mr. David W. Amram, in a series of articles in the *Green Bag*, and his book 'Leading Cases in the Bible,' has shewn how the Hebrew legal system was developed from the patriarchal type, and founded upon the family as the social unit, which like a corporation survived the death of its head. We find among the ancient Hebrews the blood feud, the liability of the head of the family for the crimes of his children, the correlative power which the family head had over the children even to deprive them of life and liberty; these archaic ideas and the corresponding status of women, the custom of polygamy, the rights and obligations of inheritance which are described in the Old Testament have their counterparts in the ancient laws of the Romans, the ancient Aryans and our own ancestors."

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#### *PROPER PRACTICE IN CHARGING JURIES.*

In some of the States the legislature has forbidden the judge, in a trial with a jury, to charge upon the evidence or express any opinion upon the value of the testimony, and he is expressly required to confine his instructions to a barren, and to the jury, often unintelligible, statement of the law of the case. In one of his lectures in Yale University, Judge Dillon remarked that such legislation "implies a distrust of the capacity of the judge to deal with the evidence in summing up so as not to be likely to do more harm than good, and it overlooks the need on the part of the jury for intelligent judicial instruction and guidance. . . . Taking the judges as they run, I very much doubt whether such legislation has the approval of the body of the Bar of the States which have adopted it. It has, doubtless, often originated, not in a public demand, or in any demand on the part of the Bar at large, but with some lawyer in the legislature who likes to control juries by declamatory rhetoric, and who has been disappointed by the conscientious discharge on the part of some independent judge of his whole duty. Under the practice required by these stat-

utes, mistaken verdicts are greatly multiplied." The State statutes above mentioned do not affect the practice in the federal courts, and the federal judges, if they are so inclined, freely advise juries on questions of fact, as authorized by the common-law practice. Sometimes a federal judge merely recapitulates the facts and leaves all the responsibility to the jury; or, having formed an opinion on the various issues in the case, he points out to the jury the considerations tending to that conclusion, giving them at the same time all the considerations which have an opposite tendency; and occasionally he adopts the rhetoric of an advocate and addresses the jury in terms which make his own strong opinion of the merits of the case unmistakable. It has been said that the first plan is that of a weak judge. But we do not think this is necessarily true; for the judge may be perfectly sure in the particular case that the jury will render a correct verdict without any suggestions from him, or the questions of fact may happen to be of such a character that wise and strong judges would freely concede the superior qualifications of an intelligent jury to determine them. Probably a federal judge's instructions are never formed on one model, and he varies his style according to circumstances and supposed necessities. In *Illinois Cent. R. Co. v. O'Neil*, (C.C.A.) 177 Fed. Rep. 328, where the plaintiff's intestate was killed at a railroad crossing, Judge Foster gave the following colourless instruction on the facts (he made no further comment on the testimony), and the plaintiff recovered, as is usual in such cases:

"Now, gentlemen, you are the sole judges of the facts in this case. There has been very little conflicting testimony, and while I have a right to comment on the evidence, it is not my intention to do so, further than to be of some assistance to you in arriving at a solution of the problem, and you are not bound in any way by my opinions as to what has been testified to; you are at liberty to disregard anything I say in regard to the evidence, and to draw your own conclusions from what you have heard. In determining the issues of fact, where there is conflict of testimony you must resolve those conflicts of testimony, you

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must try to resolve those conflicts so as to have all the witnesses speak the truth, but if you cannot do so then you will, of course, reject the evidence of those you do not believe, and you will give credence to the evidence of those you do believe. In determining who to believe you ought to take into consideration the interest that witnesses may have in the matter and the opportunity for observation that each of them had, and the general circumstances surrounding the giving of their testimony. The burden of proof is on the plaintiff to establish her case by a clear preponderance of the evidence, and the burden is on the defendant to establish its plea of contributory negligence."

We remark, in passing, that in many State courts—in Illinois, for instance—it would be unsafe for a judge to use the word "clear" in laying down the preponderance rule. In striking contrast with the foregoing instruction is the elaborate and irresistible argument of Mr. Justice Grier upholding the genuineness of a contested will in his charge to the jury in *Turner v. Hand*, 3 Wall. Jr. (U.S.) 88, 24 Fed. Cas. No. 14,257. A single passage in his masterful speech indicates the tone of the whole:

"These witnesses have either sworn what is true, or they have conspired together to commit the grossest perjury. Any other hypothesis is sheer fancy and imagination, conjured up by the ingenuity of counsel to avoid the direct accusation of a crime which the charge of fraud relied upon in their defense indirectly asserts. In order to establish this charge the testimony of defendant must be sufficient to convince your minds by satisfactory evidence. That these four ladies of unimpeachable characters were morally capable of conspiring together to commit perjury in order to sustain a forgery; and that, too, of an instrument which is of no benefit to them, but to enrich a person who was a total stranger to them—this may almost be said to be a moral miracle. But supposing them morally capable of such a conspiracy, you must be convinced also that these ladies were capable of concocting and arranging a false story so perfectly that the most scrutinizing cross-examination of counsel cannot convict them of their guilt; and of being able to narrate

this story with all its circumstances, with all appearance of artless simplicity and truth, and without a blush or tremor—a task which the most practiced, astute, and abandoned knaves in the community would be incapable of performing."

This was pretty plain notice to the jury that if they should take a different view of the case their verdict would be set aside. They returned a verdict sustaining the will.—*Law Notes*.

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#### *PASSENGER ELEVATORS AS COMMON CARRIERS.*

It seems to be the tendency of decisions to hold that a building, whether a hotel or office building, using an elevator for passengers is bound to the same degree of care as a railroad, steamboat, or stage coach. The Texas Civil Court of Appeals in *Farmers' & Mechanics' Nat. Bank v. Hanks*, 128 S.W. 147, is an illustration of this tendency.

This decision holds that a statute mentioning railroad, steamboat, stage coach "and other vehicle for the conveyance of goods or passengers" embraces "an elevator car in an office building habitually used for the transportation of passengers," and that "the reasons underlying the giving of damages" against what is specifically mentioned "apply with equal force" to the owner of such an elevator car.

It seems to us that the statute rather hinders than aids the conclusion reached, because in one respect at least the general words claimed to support it would seem limited by the maxim *id omne genus*. What were mentioned were common carriers. We doubt whether elevators in an office building are. We recognize that a common carrier must not necessarily hold himself out to the public in absolutely general way, but he may be such in the way limited, that is for carriage of specific things. But his customers need not have any prior relation with him or have their right to carriage of person or property depend upon some other antecedent or existing relation. This, however, does exist for right of carriage in an elevator. If one is a guest of a hotel,

the elevator is for his convenience. So as to the tenant of an office building. In neither case are others entitled to use the elevator except for the presumptive benefit of the guest or tenant. The guest or tenant may be said to have purchased the elevator privilege. Others are licensees through such right. The invitation to the general public as to those not guests or tenants would appear to be thus limited. But, if so, why should one such have any right against the elevator owner unless at least he go to a hotel or an office building upon the guest's invitation or tenant's business, or in furtherance, even though in a general way, of the guest's pleasure or the tenant's business? The case of *Fraser v. Harper House Co.*, 141 Ill. App. 390, was in favour of a guest, and the distinction we discuss was not considered. The case of *Sweden v. Atkinson Improvement Co.* (Ark), 125 S.W. 439, was that of an office building, and the rule was generally stated.

But whether the rule as to this strictness be limited to tenants and guests or not, there does not seem to have been any necessity for its announcement in the *Hanks* case, as the plaintiff's son was working in the shaft of an elevator and was killed by a descending elevator. That was not a passenger case at all.

An elevator for hotels and office buildings is just a substitute for stairways. Its use is for convenience if there are also stairways, and we doubt greatly whether it would be held that the keeper of a stairway is bound to the same degree of care in its proper use as a railroad of its roadbed.

The case of *Shattuck v. Rand*, 142 Mass. 83, ruled that the owner of an apartment hotel was not liable for injuries sustained by the city shutting off the water, from elevator machinery, if he did not know and could not learn by the exercise of reasonable care that there was danger from its being shut off. Here the rule seems to be reasonable, not extraordinary care. It seems to us that something else is needed than the common law rule for that high degree of care applicable to common carriers.—*Central Law Journal*.

### *THE REVOLUTION IN PORTUGAL AND INTERNATIONAL LAW.*

The revolution in Portugal irresistibly directs attention to some leading principles of public international law. It is the privilege of every State to adopt any form of government it deems best suited to its internal wants and conditions, and its identity is never lost so long as its corporate existence is preserved. While that is preserved no internal revolution can diminish any of its rights or discharge it from any of its obligations. Neither a change in the person of its ruler nor a complete transformation in the internal organization of its government can affect the treaties or public debts of a State so long as the corporate identity remains. It can be safely assumed that the corporate identity of Portugal has not been affected by the revolution. How, then, does Portugal stand in her relations with other sovereign States? All States are forced in their actual dealings with each other to accept the doctrine that the government *de facto* must finally be recognized. Dr. Hannis Taylor, the eminent United States jurist and former Minister Plenipotentiary to Spain, writes: "Even in monarchical countries, in which ideas of legitimacy and Divine right are at the root of State institutions, while there is a greater prejudice against the acceptance of a new régime founded on revolution, it is practically impossible for their administrators to hold out against accomplished facts. While the European governments refused to recognize the French Republic of 1792 because of its instability and objectionable character, they found it convenient to recognize successively the revolutionary governments of Louis Philippe in 1830, of the Republic in 1848, and of the Empire in 1852": Taylor's International Public Law, p. 196. The recognition of the government *de facto* of Portugal very clearly falls within the application of the doctrine thus expounded and illustrated.

The effect of the revolutionary change in the person of its ruler in Portugal on the status of diplomatic agents may be thus outlined. If after a Minister, as in the case of the Portuguese

Ambassador to this country, has been accredited to a State and received by it a revolutionary change takes place in the government of the State from which he comes, his functions are rather suspended than terminated, and during such suspension he is entitled to the immunities and respect due to his station. Every prudent government is careful not to decide prematurely by a formal reception of envoys from a de facto power whether or not the real sovereignty has actually passed to such power. In order to relieve the State to which such envoys are sent from making any formal or positive decision on that subject, they sometimes go in the anomalous character of agents clothed with the powers and immunities of Ministers without being invested with the representative character or entitled to diplomatic honours. If, on the other hand, after a Minister has been duly received, the government to which he is accredited is forcibly overthrown and another substituted in its place which his own country recognizes, his status is unaffected. If, however, his own country fails to recognize the new government, it is usual for a Minister to continue to enjoy the immunities originally belonging to him, although it is a grave question whether his State could claim for him such immunities as a right while it refuses to invest him with the representative character, or to recognize the lawfulness of the government upon which such claim would have been made. \*See Taylor's International Public Law, pp. 324, 325.—*Law Times.*

#### RELEASE TO TRUSTEES.

A correspondent raises a very useful little point as regards the right of a trustee to a release under seal from beneficiaries upon the distribution of the residue under a will. It is a common demand for a trustee to make on winding up his accounts that he should be given a release. In *Chadwick v. Heatley* (Coll. 137) a trustee on transferring certain stock to his *cestui que trust* was held entitled to some acknowledgment of the same being received in full, and clear of all demands, but that the trustee could not call for a release under seal. The Vice-

Chancellor makes these observations of general importance (p. 141) "Though it may not have been right (and possibly it was not the right) of the trustee to require a deed, I think that it was his right to require that his account should be settled—that is to say, that he and his family should be delivered from the anxiety and misery attending unsettled accounts—the possible ruin which they who are acquainted with the affairs daily litigated in the Court of Chancery well known to be a frequent result of neglect in such a matter." Further on, at p. 144, the learned Vice-Chancellor continues: "although in strictness a release by deed could not be demanded, yet there was nothing out of the ordinary course of business, nothing unreasonable in asking it." In *Eaves v. Hickson* (30 Beav. 142) it is also laid down that a receipt in full in respect of all claims extends only to those then known. While therefore it is a very reasonable request on behalf of a trustee on parting with the funds, and divesting himself of means of defence, that he should be secured against litigation, it is also reasonable that such a request should extend to a release under seal, for it is not always clear whether a parol release would be an effectual discharge and the more formal procedure is safer. On this point reference may be made to the Encyclopædia of Forms and Precedents, vol. 2, at p. 448. Such a form of acquittance may be subject to re-opening on a *cestui que trust* proving some material concealment, fraud, or error, but nevertheless the trustee will feel assured that a heavy onus has to be sustained by one who seeks to get behind its shelter. *Re Catt's Trusts* (No. 2) (25 Beav. 366) was a case in a slightly different form. There trustees were held not to be bound to execute a release on receiving funds from other trustees. The Master of the Rolls said that he agreed with counsel as to the uselessness generally of releases, which, in most cases, really amount to very little more than a receipt. The result is that trustees commonly ask for and obtain the formal release under seal, and all parties are exceedingly well advised when they demand and accord it, but, strictly speaking, in the absence of special circumstances nothing more can be claimed or need be

conceded than an acknowledgment. The broad utility and reasonableness of a release is illustrated by the fact that the trustees' solicitor usually prepares it and the expenses fall on the trust funds.—*Law Times*.

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#### *JUDICIAL TENURE IN ENGLAND.*

The recent establishment of two new judgeships has led a writer in the lay press to direct public attention to the fact that there is much misapprehension in reference to the tenure of the judicial office. It is popularly believed that a judge is removable by, and only by, an address of both Houses of Parliament to the Throne, whereas the tenure of judges established under the provisions of the Act of Settlement, which is that of good behaviour (*quam diu se bene gesserint*) instead of at the royal pleasure (*placito rege*), places their dismissal still within the power of the Crown in certain contingencies. Independently of the Parliamentary method of procedure for the removal of a judge under the Act of Settlement, the legal effect of their tenure of office during good behaviour furnishes the Crown with a remedy to which recourse may be had in the event of misbehaviour on the part of those who hold office by this tenure. An opinion of the law officers of the Crown in 1862—Sir William Atherton, who was then Attorney-General, and Sir Roundell Palmer (Lord Chancellor Selborne), who was then Solicitor-General—deals with the circumstances under which a patent office may be revoked. They state, in reference to the kind of misbehaviour by a judge that would be a legal breach of the conditions under which the office is held, that when a public office is held during good behaviour, a power of removal for misbehaviour must exist somewhere, and when it is put in force the tenure of the office is not thereby abridged, but is forfeited and declared vacant for non-performance of the condition on which it was originally conferred. To the same effect Mr. (Lord Chief Justice) Denman stated at the Bar of the House of Commons, when appearing as counsel on behalf of Sir Jonah

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Barrington, who was eventually removed from the judgeship of the High Court of Admiralty in Ireland by the Crown on an address of both Houses, that, independently of a Parliamentary address or impeachment for the removal of a judge, there were two other courses open for such a purpose. These were (1) a writ of scire facias to repeal the patent by which the office had been conferred; and (2) a criminal information in the Court of King's Bench at the suit of the Attorney-General. By the latter of these especially the case might easily be determined: *Mirror of Parliament*, 1830, p. 1897. It is evident that the Crown is duly empowered to institute legal proceedings against the grantee of a judicial or other office held, during good behaviour, for the forfeiture of such office on proof of misbehaviour therein: See *Todd's Parliamentary Government of England*, II., pp. 726-729.—*The Law Times*.

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A correspondent sends us the annual report of an insurance company which has its head office in London, Ont. Amongst the directors is the name of a county judge. We had thought there was only one judge in Ontario who appeared to be transgressing the laws of the land, but the County Court Bench has its representative in the class referred to as well as the High Court of Justice. The views of these gentlemen on the subject would be interesting to the profession, and we should be glad to give them full publicity should they favour us with them.

**REVIEW OF CURRENT ENGLISH CASES.**

(Registered in accordance with the Copyright Act.)

**ADMIRALTY — COLLISION — BOTH VESSELS IN FAULT — DAMAGE—  
LIMITATION OF LIABILITY—CARGO OWNER—DIVISION OF LOSS  
—ADMIRALTY RULE AS TO DAMAGES.**

The *Drumlanrig* (1910) P. 249 is a decision which shews the difference between admiralty law and common law on the question of liability for negligence. By the common law according to *Thoroughgood v. Bryan*, 8 C.B. 115, where two vehicles come into collision through the negligence of the respective drivers of them, a passenger is so identified with the vehicle in which he is travelling and affected by the negligence of its driver that he cannot sue the driver or the owner of the other vehicle for damages caused by the collision, but it appears this rule has not been adopted in admiralty law, and under that law where two vessels collide, each being in fault, the cargo owners on one ship can recover against the owners of the other ship half of the damage they sustain. By the English Judicature Act, 1873, c. 25 (9), it is provided, "In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the courts of common law shall prevail." The rule above referred to is by the Court of Appeal (Williams, Moulton and Buckley, L.J.J.) held to be one of those rules in force in the Court of Admiralty, and that which governs the liability of ship-owners to cargo owners in the case of a collision where both vessels are in fault. And inasmuch as our local Courts of Admiralty are to exercise their jurisdiction "in like manner" as the High Court in England: see Imp. Stat. 53-54 Vict. c. 27, s. 2(1). It seems to follow that this case would govern the practice in Canadian Admiralty Courts.

**COPYRIGHT—INFRINGEMENT—INJUNCTION—STUD BOOK—LIST OF BROOD MARES—DAMAGE.**

*Weatherby v. International Horse Agency* (1910) 2 Ch. 297 was an action to restrain the infringement of a copyright. The plaintiffs were the proprietors of a publication known as the "General Stud Book" which was published every four years and gave detailed particulars of thoroughbred stud

horses and mares. The defendants compiled a book called "Bruce Lowe's Figures and Stud Book, vol. 21," in which, without the plaintiffs' permission, they included the whole of the list of brood mares published in vol. 21 of their "General Stud Book." The defendants claimed that they had a right to use the list as they had done, and that their doing so would benefit the plaintiffs by increasing the sale of their "General Stud Book." Parker, J., who tried the action, however, determined that the lists in question were not such bare lists of names as to be incapable of copyright because considerable expense and trouble had to be taken in order to compile it; and that the defendants' use of the list was unfair, even though there was no likelihood of the defendants' book competing with that of the plaintiffs, and though no actual damage was shewn. He, therefore, granted the injunction.

**COMPANY—DEBENTURES BINDING FUTURE PROPERTY—FLOATING CHARGE—TRUST DEED—RESTRICTION AGAINST CREATING PRIOR MORTGAGES—PURCHASE BY COMPANY—PURCHASE MONEY REMAINING ON MORTGAGE—VENDOR'S LIEN—LEGAL MORTGAGE—CONSTRUCTIVE NOTICE—NOTICE.**

*Wilson v. Kelland* (1910) 2 Ch. 306 is an interesting case on company law. In 1904 a limited company purchased freehold property, and the vendors agreed to let part of the purchase money remain on mortgage. The conveyances to the company were executed, but remained in the custody of the vendors' solicitor, and subsequently on 7th January, 1905, the mortgage deed was executed without investigation or inquiry as to the company's title, and without notice of any trust deed or debentures. In 1901, the company had issued debentures secured by a trust deed, whereby the company charged its undertaking and all its present and future-acquired property; and by the trust deed the company was restricted from creating any charge upon its property ranking in priority to, or pari passu with, the debentures; but the condition indorsed on the debentures provided that nothing "herein" contained should prevent the creation of specific mortgages upon after-acquired leasehold or freehold property. On 7th January, 1906, the plaintiff, with notice of the debentures and trust deed, advanced money on the security of a mortgage of the same premises subject to the mortgage of 7th January, 1905, which was afterwards transferred to him. On these mortgages he now brought foreclosure proceedings, and it was held by Eve, J., that as to the mortgage of

1905, whether the vendors had or had not notice of the debentures and trust deed, any equity that attached to the property in favour of the debenture holders was subject to the paramount equity of the unpaid vendors, and that the mortgage to the vendors was entitled to priority over any person claiming through the company. But as to the mortgage of 7th January, 1906, he held that the security created by the trust deed and debenture was cumulative, and that the deed was not controlled by the proviso indorsed on the debentures, consequently he held that the company had no power to give this mortgage priority to the trust deed.

**LANDLORD AND TENANT—COVENANT BY LESSEE—"WELL AND SUFFICIENTLY TO MAINTAIN AND KEEP IN REPAIR"—CONSTRUCTION—MEASURE OF LIABILITY.**

*In re London, London v. Great Western and M. Ry.* (1910) 2 Ch. 314. This was an action to enforce a covenant by the lessee "to sufficiently maintain and keep in repair" the demised premises. The demised premises consisted of portions of the substructure and supports of Smithfield Market, for the purposes of a station. The substructure in question had been excavated and the supports of the roof thereof constructed in 1862 upon a standard of efficiency approved by referees appointed by the lessors. There was evidence that some of the girders supporting the roof and superstructure had become corroded and weakened, and in 1907 notice to repair according to the covenant was given to the lessees. In December, 1909, an originating summons was taken out to determine whether on the true construction of the covenant, the lessees were compelled to maintain the substructure thereby demised at a standard of strength and stability corresponding with that originally fixed, or whether it would be a sufficient compliance with the covenant to maintain it at such lower standard as might be actually sufficient to carry the weights and stresses imposed or to be imposed upon it, and Eve, J., answered that question by determining that the lessees were bound to maintain the structure at the standard originally fixed.

**WILL—CONDITION AS TO MARRIAGE WITH CONSENT—MARRIAGE IN TESTATOR'S LIFETIME WITH HIS CONSENT—CODICIL CONFIRMING WILL.**

*In re Park, Bott v. Chester* (1910) 2 Ch. 322. In this case the construction of a will was in question whereby the testator

gave real and personal property in trust for his son for life and on his death in case he should marry "with the consent in writing of my said wife" in trust for the son's children, and in case he married without such consent, or if he should marry with consent and have no child, in trust as to the realty for one person, and as to the personalty for another. The son actually married in the testator's lifetime and with his consent, and after the marriage the testator added a codicil confirming his will but making no alteration in the gift to the son. The son died without marrying again and without having any child. In these circumstances Parker, J., held that the condition as to marriage with consent had been fulfilled by the marriage with the testator's own consent, and that the gift over upon the son so marrying and having no child took effect.

TRUSTEE—POWER TO GRANT MINING LEASES—UNOPENED MINES.

*In re Baskerville, Baskerville v. Baskerville* (1910) 2 Ch. 329. In this case a testatrix by her will devised to trustees her undivided share in certain lands upon trust for sale and conversion, and declared that whilst any part should remain unsold the trustees might let, manage and join with any other persons in letting and managing the unsold portion, and also gave them power to grant building or other leases for such rent, etc., as they should think fit. On part of the estate were opened, and on other parts unopened, mines, and the question, for decision was as to the power of the trustees to grant mining leases of the property and Joyce, J., held that they might join with the other co-owners, in mining leases of the opened mines, but that this power did not extend to granting mining leases of unopened mines.

CONFLICT OF LAWS—MORTMAIN—TESTATOR DOMICILED IN ENGLAND—DEVISE OF LANDS IN ONTARIO FOR CHARITY—APPLICABILITY OF COLONIAL LAW TO CONSTRUCTION OF WILL—9 GEO. II. c. 36—MOVABLES—IMMOVABLES.

*In re Hoyles, Row v. Jagg* (1910) 2 Ch. 333. In this case a testator, a domiciled Englishman, by his will devised and bequeathed certain freehold mortgages of lands in Ontario, to be applied to purposes of charity. The will was dated in 1878, and the testator died in 1888. The Imperial statute, 9 Geo. II. c. 36, had been incorporated into the provincial law by the Constitutional Act of 1792, and was not repealed till 1902 (see now

R.S.O. c. 333), and under that Act the devise and bequest would be void as being a gift in mortmain of impure personality; and Eady, J., held that the provincial law controlled the case and that the gift therefore failed, the mortgages, though personality, being held to be immovables and governed by the law of the situs of the land.

**DEED—ASSIGNMENT FOR VALUE—DEFECTIVE TITLE—SUBSEQUENT ACQUISITION OF GOOD TITLE—ESTOPPEL.**

*In re Bridgwater, Partridge v. Ward* (1910) 2 Ch. 342. In this case a man having, as he supposed, an absolute reversionary interest in a settled fund, mortgaged it to secure a debt and by the same instrument it was recited that he had agreed to assign all his interest, absolute and reversionary, in the fund to secure the debt. As a matter of fact part of the fund had been appointed at the time of the making of the mortgage, and the mortgagor was then only entitled to a moiety of the residue of the fund, subject to an outstanding life interest. The mortgage contained covenants for title, and further assurance. By the subsequent death of the owner of the other moiety of the residue of the fund the mortgagor as her next of kin became entitled to that moiety, and the question was whether that moiety of the residue was bound by the mortgage, it having been acquired by the mortgagor after the date of the mortgage. Eady, J., came to the conclusion that the intention of the mortgagor was to assign the whole fund and not merely a moiety, and that he was liable to make good the mortgage to the extent of any interest he actually acquired.

**ELECTRIC LIGHTING — MUNICIPAL CORPORATION — STATUTORY POWERS—“SUPPLY OF ELECTRICITY”—“THINGS NECESSARY AND INCIDENTAL TO SUCH SUPPLY”—SALE OF LAMPS AND FITTINGS—ULTRA VIRES.**

*Attorney-General v. Leicester* (1910) 2 Ch. 359. This was an action to restrain a municipal corporation from acting in excess of its statutory powers. The defendants were by statute empowered to supply the inhabitants of the municipality with electricity and to “enter into such contracts and generally do all such things as may be necessary and incidental to such supply.” In addition to entering into contracts for the supply of electricity the defendant corporation engaged in the sale of electrical fittings and apparatus to consumers of electricity. This

was held by Neville, J., to be an act in excess of the statutory powers of the corporation, which ceased with the delivery of electricity at the terminals, i.e., the meters on the consumers' premises, the learned judge being of the opinion that the general powers above referred to were limited to the generation and delivery of electricity.

**PATENT—INFRINGEMENT—AMENDMENT OF SPECIFICATION—DISCLAIMER—TERMS OF AMENDMENT—INJUNCTION—PATENTS & DESIGNS ACT, 1907 (7 EDW. VII. c. 29), ss. 22, 23, 33—(R.S.C. c. 69, s. 24).**

*Gillette Safety Razor Co. v. Luna Safety Razor Co.* (1910) 2 Ch. 373. By the English Patent Act 1907, an application to amend a specification in a patent has to be made to the court, whereas under the Canadian Patent Act (R.S.C. c. 69, s. 24) the application must be made to the Commissioner of Patents. This action was to restrain an infringement of a patent, and in the course of the action an application was made to the court to amend the specification, and the case will furnish a guide as to the manner in which the jurisdiction of the Commissioner of Patents in a like case should be exercised. The patent in question was for a safety razor, and the proposed amendment was in the nature of a disclaimer, and the applicants asked that they might be at liberty to use the patent as amended at the trial of the action. The court (Parker, J.) granted the proposed amendment, but on the following terms, (1) the applicants to pay the costs of application, including the costs of third persons served with notice of the application as required by rules of court; (2) that no relief by way of damages should be sought by the plaintiffs against persons for infringement of the patent prior to the making of a consent order in November, 1909, whereby all actions of the plaintiff for infringement were stayed pending the result of the application to amend; and that the plaintiffs should seek no relief by way of injunction or damages against the defendants in respect of any razors made in, or imported into, England prior to November, 1909, if the judge at the trial should find that the plaintiffs' original claim was not framed in good faith or with reasonable skill and knowledge, and the plaintiffs were also required to undertake not to claim any relief in respect of any razor purchased by, or coming to the hands of, any member of the public, as distinct from the trade, prior to November, 1909.

**INFANT—NEXT FRIEND—UNSUCCESSFUL ACTION BY INFANT—INDEMNY TO NEXT FRIEND FOR COSTS.**

*Steeden v. Walden* (1910) 2 Ch. 393. In this action the plaintiff, who had previously brought an unsuccessful action on behalf of the defendant as his next friend sought to be indemnified out of the defendant's estate for the costs and damages so incurred. The action brought on the defendant's behalf (he being an infant) was instituted on the advice of counsel, and in the course of the action an interim injunction had been granted on the usual undertaking of the plaintiff as next friend as to damages. The action was dismissed with costs, and an inquiry was ordered as to damages, which were assessed, with the result that the plaintiff had been compelled to pay for damages and costs including those of his own solicitor, over £700, for which he now claimed to be declared entitled to a charge on the infant's lands. Eve, J., being of the opinion that the action had been instituted by the advice of counsel on reasonable grounds and conducted with diligence and propriety in the interest of the infant, held that the plaintiff was entitled to be indemnified by the infant, and he made a declaratory judgment to that effect, but inasmuch as the infant's estate was not being administered by the court, he declined to make any declaration of charge, but he gave the plaintiff liberty to apply.

**HABEAS CORPUS—FOREIGN COUNTRY IN WHICH CROWN HAS JURISDICTION—FOREIGN JURISDICTION ACT, 1890 (53-54 VICT. C. 37)—ORDER IN COUNCIL—PROCLAMATION—ARREST—HABEAS CORPUS ACT, 1862 (25-26 VICT. C. 20).**

*The King v. Crewe* (1910) 2 K.B. 576. This case though perhaps not of any practical interest in Canada, is yet noteworthy from a constitutional standpoint. By an order in council, dated in 1891, in exercise of the powers vested in Her late Majesty by the Foreign Jurisdiction Act, 1890, the High Commissioner of South Africa was authorized to exercise in Bechuanaland Protectorate the powers of Her Majesty and "do such things as are lawful," and provide for the administration of justice and generally for the peace, order and good government of all persons within the Protectorate, including the prohibition of all acts intended to disturb the peace. One Skegome, who claimed to be a chief of a native tribe, was detained in custody at a place within the Protectorate, by virtue of a pro-

clamation of the High Commissioner authorizing his detention, on the ground that his detention was necessary for the preservation of the peace. The present proceedings for habeas corpus were instituted by Skegome against Earl Crewe, the Secretary of State for the Colonies. A Divisional Court having discharged the order nisi, the applicant appealed to the Court of Appeal, and the appeal was dismissed, their Lordships holding that the Protectorate was a foreign country in which the Crown had jurisdiction within the Foreign Jurisdiction Act, 1890, and that the proclamation was validly made under the powers conferred by the order in council of 1891, and that the detention of Skegome was lawful. Williams and Kennedy, L.J.J., however, were of the opinion that the Protectorate was not a foreign dominion of the Crown within the Habeas Corpus Act of 1862, which, it may be remembered, was passed in consequence of the celebrated *Anderson Fugitive Slave* case (11 C.P. 9) and prohibited the English Courts from issuing a habeas corpus to a colony or other foreign dominion of the Crown where local Courts had been established with power to grant the writ. In a proper case, therefore, it would seem the writ might properly have issued, but it is doubtful whether the Secretary of State in such a case would be the proper party to make respondent, as the prisoner was in no sense in his custody.

ASSIGNMENT OF CHOSE IN ACTION—PART OF DEBT ASSIGNED—  
RIGHT OF ASSIGNEE TO SUE—JUDICATURE ACT, 1873 (36-37  
VICT. c. 66) s. 25 (6)—(ONT. JUD. ACT, s. 58 (5)).

*Shipper v. Holloway* (1910) 2 K.B. 630. In this case, Darling, J., holds that where a part of a debt is assigned, the assignee is within the Judicature Act, s. 25 (6), (Ont. Jud. Act, s. 58 (5)), and is entitled to sue for the recovery or the part assigned in his own name, but the authority of this case seems to be somewhat doubtful when the following case is taken into consideration. It may also be noted that it may render a debtor liable to a multiplicity of suits in respect of the same debt which can hardly have been the intention of the Judicature Act. It is also to be noted that the case was appealed, and the appeal allowed, but on the ground that the supposed debt had no existence, and it therefore became unnecessary for the Court of Appeal to pass on the question whether an assignment of a part of it would be within the Judicature Act.

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JUDGMENT DEBT—CHOSE IN ACTION—ASSIGNMENT OF CHOSE IN ACTION—ASSIGNMENT OF PART OF JUDGMENT DEBT—ASSIGNEE—LEAVE TO ISSUE EXECUTION—JUDICATURE ACT, 1873 (36-37, VICT. C. 66) S. 25 (6)—(ONT. JUD. ACT, S. 58 (5)).

*Forster v. Baker* (1910) 2 K.B. 636. In this case also, the effect of an assignment of a part of a chose in action was in question. In the present case a part of a judgment debt was assigned and the assignee applied to the Court for leave under Rule 601 (Ont. Rule 864) to issue execution for the part assigned. Bray, J., refused the application on the ground that there cannot be an absolute assignment within the Judicature Act, s. 25 (6) (Ont. Jud. Act. s. 58 (5)) of a part of a chose in action, and the Court of Appeal (Williams, Moulton, and Farwell, L.J.J.) affirmed his decision on the ground that as the original judgment creditor could only issue a single execution upon his judgment and could not split up the judgment debt and issue separate executions for different parts of it, he could not give an assignee a right which he did not himself possess.

SET OFF—MUTUAL DEBTS—ASSIGNMENT TO DEFENDANT OF DEBT OWED BY PLAINTIFF—SET OFF BY DEFENDANT OF DEBT ASSIGNED—JUDICATURE ACT, 1873 (36-37 VICT. C. 66) S. 25 (6)—(ONT. JUD. ACT, S. 58 (5)).

In *Bennett v. White* (1910) 2 K.B. 643, the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.J.J.) have reversed the decision of the Divisional Court (1910) 2 K.B. 1 (noted ante, p. 491). The Court of Appeal holding that a defendant may set off *pro tanto* against a debt owing by him to the plaintiff, a debt owing by the plaintiff to a third party whereof the defendant is assignee.

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REPORTS AND NOTES OF CASES.

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**Province of Ontario.**

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**HIGH COURT OF JUSTICE.**

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Middleton, J.]                    **DAVIS v. WINN.**                    [Sept. 26.

*Costs—Summary disposition—Master in Chambers—Jurisdiction  
—Consent of parties—Appeal.*

Appeal by the defendant from an order of the Master in Chambers requiring her to pay the costs of the action. The motion before the Master was for summary judgment under Con. Rule 616, but it was dealt with as a motion to determine the incidence of the costs of the action—it being said that the further prosecution of the action for any other purpose was rendered unnecessary by reason of the execution of certain conveyances.

*Held,* 1. That there was much room for doubt whether the Master in Chambers has jurisdiction to deal with a motion under Con. Rule 616, which amounts to the hearing and determining of the cause. Admissions may be made in pleadings and on examinations which raise matters of the greatest importance and difficulty, and the parties are entitled to have the case disposed of before a forum from which there is an unfettered right of appeal. The Master was, therefore, right in dealing with the motion as one to determine costs only, and the parties so treated it, and, if the defendant's consent was necessary, his solicitor's letter of the 25th August was a sufficient consent.

2. The plaintiff should not receive costs, and perhaps should pay costs; but, on the whole, it would be better to leave the parties each to pay his or her own costs. The appeal is allowed.

*W. E. Raney, K.C., for the defendant. John MacGregor,  
for the plaintiff.*

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Middleton, J.]                    **RE BOLSTER.**                    [Oct. 1.

*Will—Construction—Pecuniary words—Restraint—Trust.*

Motion by a devisee under the will of Lancelot Bolster, for an order determining the question whether the land devised to

him was vested in him in fee simple free from any trust or restraint.

By his will the testator devised the property known as Eastview to the applicant, "with the wish that he may keep the same free from mortgage as a summer residence for himself and children." The applicant, in view of changed circumstances, finds the property unsuitable as a summer residence, and seeks to have it declared that he is the owner in fee simple so that he can sell it. Save the words quoted there was nothing in the will to cut down the absolute gift.

MIDDLETON, J.:—In *Bank of Montreal v. Bower*, 18 O.R. 226, the cases are reviewed, and the rule is thus laid down: "If the entire interest in the subject of the gift is given with superadded words expressing the nature of the gift, or the confident expectation that the subject will be applied for the benefit of particular persons, but without in terms cutting down the interest before given, it will not now be held without more, that a trust has been thereby created."

Since then the whole question was very fully discussed in *In re Williams*, [1897] 2 Ch. 12. Lord Justice Lindley says: "There can be no doubt that equitable obligations, whether trusts or conditions, can be imposed by any language which is clear enough to shew an intention to impose an obligation and is definite enough to enable the court to ascertain what the precise obligation is and in whose favour it is to be performed. . . . If property is left to a person in confidence that he will dispose of it in a particular way, as to which there is no ambiguity, such words are amply sufficient to impose an obligation." Rigby, L.J., who dissents in the application of the law to the will then under discussion, adopts as the guiding principle the words of Lord St. Leonards: 'Clear words of gift to a devisee, for his own benefit free from control, shall not be cut down by subsequent words, which may operate as an expression of a desire without disturbing the previous devise.' "

Two cases came before the Court of Appeal in 1904 in which the matter was discussed, *In re Oldfield*, [1904] 1 Ch. 549, and *In re Hanbury*, [1904] 1 Ch. 415. In each case the court accept *In re Williams* as practically adopting what Lord St. Leonards had called "the not unwholesome rule, that, if a testator really means his recommendation to be imperative, he should express his intention in a mandatory form."

Although *In re Hanbury* was reversed in the Lords, [1905] A.C. 84, nothing was then said at all qualifying the law laid

down in the Court of Appeal upon the matter now under discussion; in fact, the decision upon this question is affirmed, the view being taken that, though the gift was absolute, it was, in the events that had happened, subject to an executory devise. This agrees with the view expressed by Joyce, J., in *In re Burley*. [1910] 1 Ch. 215.

This will creates no obligation or trust, and the applicant is the owner in fee.

*G. Waldron*, for the applicant. *F. W. Harcourt*, K.C., for the infants.

Boyd, C.]

MOFFATT v. LINK.

[Oct. 1.

*Costs—Scale of—Slander—Malicious prosecution—Damages—Amount claimed more than \$500—Assessment by jury at less—County Court jurisdiction—Set-off.*

Action for malicious prosecution and slander brought in the High Court, and tried with a jury begun August 30, 1909, and tried Sept. 27, 28, 1910. The plaintiff claimed \$5,000 damages. The jury, in answer to questions, made findings in favour of the plaintiff, and assessed the damages at \$110—\$10 for the malicious prosecution and \$100 for the slander. The Chancellor refused a motion for a nonsuit, and gave judgment for the plaintiff on the findings of the jury, reserving the question of costs. By 9 Edw. VII. ch. 28, sec. 21(1), the County and District Courts have jurisdiction in . . . (b) personal actions, except actions for criminal conversation and actions for libel, where the sum claimed does not exceed \$500. By s. 43, the Act was not to come into force until a day to be named by the Lieutenant-Governor by his proclamation. This part of the Act was brought into force on, from, and after the 10th June, 1909, by proclamation in the Ontario *Gazette* of the 22nd May, 1909.

BOYD, C.:—The plaintiff in an action for slander or for malicious prosecution cannot, by claiming more than \$500, now since 9 Edw. VII. c. 28, get rid of the effect of Con. Rule 1132, which provides for the taxation of costs in cases where actions of County Court competence are brought in the High Court. The test as to the quantum of costs is measured by the amount recovered, and not by what is claimed. If such an action of comparatively trifling importance is brought in the High Court, the plaintiff has to run the risk of being amerced in costs, unless

he can get the Judge to certify that the provisions of the general order should not apply. This is clearly not a case for giving such a direction, and therefore the plaintiff has to tax only County Court costs, with a set-off to the defendant of his costs on the High Court scale. This set-off will apply, if necessary, to reduce the \$110 recovered by the plaintiff.

*A. B. Morine, K.C., for plaintiff. Alexander MacGregor, for defendant.*

Middleton, J.]

[Oct. 3.

PETTIGREW v. GRAND TRUNK R.W. Co.

*Third parties—Relief over—Indemnity—Relation to plaintiff's claim—Negligence—Breach of contract—Issues for trial.*

Appeal by the Knechtel Lumber Company, third parties, from an order of the Master in Chambers giving directions for the trial of the issues between the defendants and the third parties. The plaintiff sued the defendants for damages for the death of her husband, who was killed upon a siding running from the defendants' main line of railway to the yards of the third parties. A train was backing into the siding to connect with a car standing there. The deceased, as the plaintiff alleged, for the purpose of making the coupling, descended from the train, and, because lumber had been piled close to the track, was compelled to walk along the track itself, and was knocked down and killed. It was said, also, that snow and ice had accumulated, and this sloped down to the track, making it impossible to use such small space as there was between the lumber and the rails. It was also alleged that the frog at this point was packed, and that the deceased in walking along the track caught his foot in it. It was also alleged that the train was not in charge of a skilled person, and was run recklessly and at too high a rate of speed. The foundation for the claim over against the third parties was an agreement of the 16th March, 1903, under which the defendants constructed the siding, and the third parties paid interest on the cost, and also paid the cost of maintenance and repair. The third parties agreed to keep the siding free from snow, ice, and obstruction, and also agreed to keep a space six feet wide on each side of the siding free from all obstructions.

MIDDLETON, J.:—Upon the plaintiff's case it may be found that the accident was caused by the failure of the lumber com-

pany to observe their contract. . . . On the other hand, the plaintiff may be entitled to recover against the railway company in respect of matters quite apart from those indicated. In my view, the defendants do not lose their right to have their claim against the third parties determined in this action because the plaintiff, in addition to basing her claim to recover upon grounds as to which there is or may be a right of indemnity, also alleges that she can recover upon other grounds with which the third parties have no concern. The rights of the parties are not to be finally determined on the interlocutory motion for directions, except in the plainest cases; and it is enough that the plaintiff has made a claim against the defendants in respect of which there is a *prima facie* right to relief over. . . . Unless the third party proceeding can be made use of in a case like this, it has very largely failed in its object. The third parties are manifestly interested in the questions to be determined between the plaintiff and the defendants, and ought to be heard at the trial so as to see that this question is duly tried, and that the ground of liability is definitely ascertained. There ought only to be one trial of the question of the defendants' liability, and at that the facts ought to be so ascertained that the question between the defendants and the third parties will be in train for adjustment. This can be accomplished by questions being submitted to the jury.

Appeal is dismissed with costs to be paid by the third parties to the plaintiff and defendants in any event.

*G. H. Kilmer, K.C., for third parties. D. L. McCarthy, K.C., for defendants. S. G. Crowell, for plaintiff.*

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Divisional Court, K.B.]

[Oct. 6.

RE SOLICITOR.

*Solicitor—Retention of client's money—Order for delivery of bill of costs—Retainer.*

Appeal by the solicitor from the order of MIDDLETON, J., 21 O.L.R. 255.

RIDDELL, J.:—Whatever the form, the substance of this application is to have a declaration that a solicitor obtaining money for his client is entitled to retain thereout an amount promised him—agreed in writing to be paid to him—by his client as a “retainer.” Its meaning is, a preliminary fee given to secure

the services of the solicitor and induce him to act for the client. A client may give his solicitor or counsel a preliminary fee in this sense—if so, it is a present; it does not at all diminish the fees properly chargeable and taxable against the client, and does not appear in the bill. . . . A promise to pay a "retainer" is not enforceable—and if the professional man is content to take a promise to pay a "retainer," instead of insisting upon payment in cash, he must rely upon the honour and generosity of his client. A promise to pay a retainer is void.

The appeal should be dismissed with costs.

*E. Meek, K.C., for appellant. R. McKay, for client.*

## Province of Manitoba.

### COURT OF APPEAL.

Full Court.]

*ALDOUS v. SWANSON.*

[Sept. 27.

*Principal and agent—Revocation of agency—Work done before revocation—Commission on sale of land—Quantum meruit—Distinction between power to revoke authority and right to do so.*

Appeal from judgment of METCALFE, J., noted ante, p. 388, dismissed with costs.

Full Court.]

[Sept. 27.

### *HAINES v. CANADA RAILWAY ACCIDENT CO.*

*Accident insurance—Proviso against liability if insured come to his death while under the influence of intoxicating liquor—Onus of proof—Condition that notice of death must be given within ten days thereafter—Tender before action, whether an admission of liability—Waiver—Impossibility of performance.*

Appeal from judgment of MATHERS, C.J., noted ante, p. 270, allowed with costs, the court

*Held, 1. (CAMERON, J.A., dissenting).* A notice within ten days after discovery of the body of the insured was sufficient.

*Bailey v. De Crespigny, L.R. 4 Q.B., at p. 185, and Trippe v.*

*Provident Fund Society*, 140 N.Y. App. 23, followed. *Cassel v. Lancashire, etc., Ins. Co.*, 1 T.L.R. 495, distinguished.

2. Per PERDUE and CAMERON, JJ.A.—The tender by the defendants before action of one-tenth of the amount of the policy, followed by a plea of tender and payment of the one-tenth into court, was an admission of liability on the policy and a waiver of the condition as to notice.

The decision of Mathers, C.J., on the question of the intoxication of deceased should not be disturbed.

*Trueman*, for plaintiff. *Fullerton*, for defendants.

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Full Court.]

[Sept. 27.

*Wood v. CANADIAN PACIFIC Ry. Co.*

*Negligence—Railway company—Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 178—Contributory negligence—Volenti non fit injuria—Evidence to go to the jury—Non-suit—New trial.*

At the trial before a jury of an action by a switchman to recover damages against a railway company for injuries alleged to have been caused to him while engaged in the execution of his duty under the orders of his foreman through negligence in the operation of a train by other servants of the company and because there was not sufficient room between the different tracks in the railway yard to enable the plaintiff to carry on his work safely, the defences of contributory negligence and *volenti non fit injuria* are properly for the jury and, when there was some evidence that the bell had not been rung or the whistle sounded on the train which struck the plaintiff, and to shew that the "lay-out" of the yard was defective, a verdict entered for the defendants by direction of the trial judge should be set aside and a new trial granted.

*Toronto Railway Co. v. King* (1908) A.C. 260, and *Higley v. City of Winnipeg*, 20 M.R. 22, followed.

*Macneill*, for plaintiff. *Aikins, K.C.*, and *Curle*, for defendants.

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Full Court.]

*KERFOOT v. YEO.*

[Oct. 4.

*Vendor and purchaser—Rescission of contract—Cancellation—Right to recover money paid under cancelled agreement.*

Appeal from judgment of MACDONALD, J., noted vol. 45, p. 573, dismissed with costs.

## KING'S BENCH.

Mathers, C.J.]

[August 11.

IN RE BLACKWOOD AND C. N. R. CO.

*Railway — Arbitration — Costs — Taxation—Fees of arbitrator who resigned pending the arbitration.*

Application by the railway company under s. 199 of the Railway Act, R.S.C. 1906, c. 37, to have its costs of an arbitration to determine the amount of compensation to be paid for land taken taxed by the judge, the board of arbitrators having awarded only the sum previously offered by the company. Mr. Johnson, one of the arbitrators first appointed, resigned before the award was made and a new arbitrator was appointed in his stead. The owner took up the award, paying the fees of all the arbitrators but Mr. Johnson, who came in on this application and asked that his fees be paid.

*Held*, that he could have no relief on this application, but must be left to his remedy, if any, against the owner by action.

In taxing the costs of the arbitration under the statute, the judge acts ministerially and cannot decide anything as to the right to costs.

*Ontario & Quebec Ry. v. Philbrick*, 5 O.R. 674, 12 S.C.R. 288, followed.

*Clark*, K.C., for the Railway Co. *G. A. Elliott*, for Blackwood. *Hough*, K.C., for Johnson.

Prendergast, J.]

THORDARSON v. AKIN.

[August 15.

*Survey of land—New survey—Errors in survey.*

When, upon a new survey of a block of lots giving only the family for the crimes of his children, the correlative power which the family head had over the children even to deprive them outlines, it is determined that there is a small excess in the length of the block over the dimensions shewn in the original subdivision survey, there is no principle of law requiring that such excess should in all cases be distributed over the whole length of the block so as to increase the width and change the true boundaries of every lot; but, if the case requires that such excess should be distributed or located at all, it may, according to circum-

stances, be located or allotted at one or the other end of the block. In the present case the southern boundary of the block was a known and definite street line from which all but a few of the lots, each 25 feet in width and rectangular in shape, were numbered off in the original survey until near the southerly boundary of another street which ran obliquely along the north end of the block, leaving an area whose east and west boundaries were 88 and 132 feet in length respectively and which was subdivided into four lots of different sizes.

*Held*, that, in this case, the excess in question should be attributed or located to or amongst this last mentioned area, thus leaving all the rectangular lots as in the original survey.

*Barry v. Desrosiers*, 9 W.L.R. 633, followed.

*Anderson, K.C., and Garland*, for plaintiff. *Rothwell and Bergman*, for defendant.

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## Province of British Columbia.

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### COURT OF APPEAL.

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Full Court.]

[Oct. 17.

*McDONALD v. VANCOUVER, VICTORIA AND EASTERN Ry. Co.*

*Railways—Right of way—Land acquired for or actually taken—Obligation of company to take lands—Railway Act (Dominion), secs. 158, 159, 160.*

A railway company, in its acquirement of right of way, included inter alia land in which the plaintiff had a leasehold interest, but the right of way was at no time wholly upon the plaintiff's property, the greater portion being upon adjoining lands. The company, without proceeding to arbitration acquired the interest of the plaintiff's lessor, and built its road clear of but adjoining that portion of the indicated right of way over the land in which the plaintiff was interested. In an action to compel the company to acquire and pay for the right of way as indicated, the company contended that it could be compelled to pay for only that portion of the right of way which it actually took possession of, and Irving, H., at the trial dismissed that contention and held that the plaintiff was injuriously affected by the construction and operation of the railway.

*Held*, on appeal (MARTIN, J.A., dissenting), that the trial judge was right.

*A. H. MacNeill*, K.C., for appellant company. *G. E. Martin*, for plaintiff, respondent.

## Bench and Bar.

### APPOINTMENTS TO OFFICE.

Hon. Horace Harvey, a Puisne Judge of the Supreme Court of Alberta, to be Chief Justice of the Supreme Court of Alberta with the title of Chief Justice of Alberta, in the room and stead of Hon. Arthur Lewis Sifton, resigned. (Oct. 12.)

William Charles Simmons, of Lethbridge, in the Province of Alberta, Barrister-at-law, to be a Puisne Judge of the Supreme Court of Alberta, in the room and stead of Hon. Mr. Justice Harvey, promoted to be Chief Justice of said court. (Oct. 12.)

Blaise Letellier, of Beauceville, Province of Quebec, K.C., to be Puisne Judge of the Supreme Court of the Province of Quebec, in the room of Jean Alfred Gagne, deceased. (Oct. 12.)

Hon. James Drummond McGregor, of New Glasgow, in the county of Pictou, Nova Scotia, to be the Lieutenant-Governor of the Province of Nova Scotia, in the room and stead of Duncan Cameron Fraser, deceased. (Oct. 18.)

## Flotsam and Jetsam.

THE MAN WITH THE MUCK-RAKE:—Not one whit too severe is the apt and striking cartoon that appeared in *Punch*. Under the fearless title of “A Dirty Trade,” it represents the “Gutter Press” standing in the foul stream of Sensationalism,” and offering, for “a few more coppers, gents,” to “roll in it!” With splendid sarcasm *Truth* also utters its voice of protest, and concludes a couple of merciless verses thus—

Good taste? What's that to do with gains?  
The one material fact remains—

It ANSWERS.

One of the worst blights that for generations has settled upon our land is that of individuals or syndicates which purvey their daily and weekly feasts of sensationalism to demoralize the public mind. The “liberty” of the Press is fast becoming a national curse.—*Exchange*.

# Canada Law Journal.

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## *APPEALS TO THE KING IN COUNCIL.*

A correspondent, whose letter we publish elsewhere, writes in terms of severe condemnation of the Lords of the Privy Council, who in giving judgment in the case of *Gordon v. Horne*, on appeal from the Supreme Court of Canada, did not accept as credible the statements of a witness whose credibility was accepted by the trial judge and by the judge of the Supreme Court.

It is necessary for a proper understanding of the discussion to note some features connected with it which do not appear in the letter above referred to. Our correspondent does not refer to the fact that the Supreme Court of British Columbia, consisting of three judges (as appears from the report in 42 S.C.R. 240), reversed the judgment of the trial judge. They apparently did not feel pressed with any necessity to defer to his view of the evidence, but, on the contrary, after a review of the evidence, disagreed with him. They were surely nearer the scene of action than even the Supreme Court of Canada, which our correspondent says also carefully considered the evidence and declined to interfere.

The result, therefore, seems to be that three judges in British Columbia, two in the Supreme Court of Canada, and four in England disagreed with the trial judge as to his view of the evidence, whilst only three judges of the Supreme Court of Canada (out of five) either declined to differ with the conclusion of the judge who had heard the evidence, or perhaps agreed with that conclusion.

The contention of our correspondent is that where the question at issue is simply one of fact that is not an issue which should be removed from the jurisdiction of the trial judge, who had the opportunity of hearing the witness, of testing his veracity, and of forming the safest opinion as to how far his evi-

dence was to be relied upon. This view of the case is undoubtedly the correct one, and the one generally acted upon. It is, however, equally true that there may be something in the surroundings of a case, in the bearing of other facts upon the statements made by the witness, to which the trial judge impressed by the personal demeanour of the witness, perhaps unconsciously influenced by some personal or local feeling, which the best of judges, being human, are liable to, did not give the weight to which such consideration were entitled; but which would influence a court dealing with the case presented in the cold light of the general principles which control the actions of men, and especially of men in business.

The law affecting this question is clearly set forth in the admirable judgment of Mr. Justice Riddell in *Beal v. Michigan Central R.R. Co.*, 19 O.L.R. 504. We quote his language on page 506:—

“Upon an appeal from the findings of a judge who has tried a case without a jury, the court appealed to does not and cannot abdicate its right and its duty to consider the evidence. Of course, ‘when a finding of fact rests upon the result of oral evidence, it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons.’ *Lodge Holes Colliery Co. v. Mayor, etc., of Wednesbury*, [1908] A.C. 323, at p. 326, per Lord Loreburn, L.C. And ‘when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses.’ *Coghlan v. Cumberland*, [1898] 1 Ch. 704, at p. 705, per Lindley, M.R., giving the judgment of the Court of Appeal: *Bishop v. Bishop* (1907) 10 O.W.R. 177.

“But where the question is not, ‘What witness is to be believed?’ but, ‘Give full credit to the witness who is believed, what is the inference?’ the rule is not quite the same. And if it appear from the reasons given by the trial judge that he has misapprehended the effect of the evidence or failed to consider a material part of the evidence, and the evidence which has been

believed by him, when fairly read and considered as a whole, leads the appellate court to a clear conclusion that the findings of the trial judge are erroneous, it becomes the plain duty of the court to reverse these findings.\*

In the case under discussion, as already pointed out, it would appear that the judges of the Supreme Court of British Columbia, where the action was tried, held an opinion similar to that expressed by the Privy Council. If this is correct our correspondent's contention, so far as this case is concerned, fails on his own shewing, even though he correctly states the general principles involved. However that may be, the case stated by our correspondent seems to us a very slight foundation, certainly so when attendant circumstances are disclosed, upon which to base a somewhat unfair and uncalled for reference to advisers of His Majesty in Council and comparing them in this with their Canadian brethren. Comparisons are generally odious, and should be especially so in the present case where we are justified in assuming the presence of the highest capacity and unfailing rectitude.

As to this phase of the subject we have no desire to decry the ability or learning of the Canadian Bench, but we must look the matter in the face and not be led away by partiality or prejudice. It is an obvious and well-known fact (1) that our judges in this country are selected almost entirely from the supporters of the Government then in power, and selected, moreover, for political reasons; (2) that the best men at our Bar are not generally chosen, partly for the reasons above referred to, and partly because the honour of the position is out-weighed by the inadequacy of their emolument. On the other hand the English Bench is selected from the very best men at the English Bar—men of the highest legal training that the world affords—the pick of a population of sixty millions, as compared with our six millions. We have had occasion to criticize from time to time the spirit of the "little Englander." Is there not some-

\*See also cases cited in Holmested & Langton, p. 43, and *Price v. Bryant*, 4 O.A.R. 542.

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thing equally "insular" in the tone of those who, for so-called patriotic reasons, indulge in the parrot cry, "Canada for the Canadians." What we need in Canada is the best thoughts, the best methods and the best men we can copy or get from any other land, and use them for the development of a great country, the success of which would be retarded by such short-sighted, prejudiced policy.

We hope it is not necessary at the present day to enter into any defence of the right of appeal to the Privy Council. That right is a constitutional one, and it is not only a right but a privilege. It might be necessary to guard against any abuse of it, and it might add to the value and influence of the court if there was habitually attending it a Canadian jurst who could guide its decisions in cases when local customs and local terms, familiar to ourselves but unknown to others, form part of the matter in question. That, however, is not the case in the matter before us.

Whether it would be possible to frame a rule that would exclude such questions as the veracity of a witness or other simple issues of fact, from the purview of a Court of Appeal, for in this respect the Privy Council is in exactly the same position as our Supreme Court, we very much doubt. Judges at Ottawa are just as likely to be mistaken in a case such as this as judges at Westminster.

With all due respect to our correspondent he must make a stronger case before he can induce us to accept the conclusions he would arrive at from the general tenour of his letter.

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***THE INTERNATIONAL CONFERENCE ON BILLS OF EXCHANGE.***

From the first it was highly improbable that the adoption of any universal law with regard to bills of exchange, at any rate so far as Great Britain and the United States were concerned, would be the outcome of the conference which took place last year at The Hague, to which we referred shortly recently. In

the instructions to the British delegates it was stated that they were not to hold out any hope that the English rules of law were likely to be substantially modified and brought into conformity with continental rules, particularly in cases where the English rule prevails, not only in the United Kingdom, but also throughout the English-speaking world. But there were certain points on which the English law was doubtful, or where there were points of divergence between the different English-speaking communities, and in such cases it was pointed out to our representatives that it would evidently be desirable if a uniform rule could be arrived at, as the uniformity of the rule would be probably of more importance than the nature of the rule itself.

The attitude of this country, and the reasons therefor, were defined before the commencement of the conference, this position being made quite clear by Sir George Buchanan in his final speech in the following words:—

"However, it is our duty to affirm that it is impossible for our Government to go further or to depart from the attitude which it has taken from the beginning of this conference. It is no question of national pride or obstinacy which has given rise to this attitude, but the necessity of safeguarding the interests of our mercantile community. A law which governs more than 120,000,000 people—including the United Kingdom, the British colonies, and most of the States of the United States of America—without counting the vast population of the Indian Empire—cannot be modified without disturbing long-settled commercial relations and without creating divergencies in legislation among the members of the Anglo-Saxon family. It is possible that among the rules of English law there are some which are antiquated and inconvenient, but in its main lines our law does but incorporate the usages of our commerce. It is not an arbitrary law imposed by the Legislature on the commercial community; the Legislature has but given the sanction of law to the usages of our commerce and trade, and in modifying that law we should upset long established customs. There are other reasons in the domain of law which raise equal difficulties. We have no separate droit de change. We have no tribunals of commerce. We draw no distinction between traders and non-traders. Our commercial law is an integral part of our common law, and it is the

ordinary civil courts which give effect to its provisions in the same manner as they give effect to ordinary debts and obligations."

And practically the same attitude was taken up by the United States.

After a full discussion, a draft convention and draft uniform law applying only to bills of exchange and promissory notes payable to order was unanimously accepted by the delegates of more than thirty nations, and, as our representatives state, this draft uniform law approaches the English law rather more nearly than any existing continental code, but the points of divergence are numerous and, in some cases, of far-reaching importance. It has, however, no application to promissory notes payable to bearer or to cheques, and Sir M. D. Chalmers and Mr. F. H. Jackson, who may be said to have represented English law and commerce respectively at the conference, have prepared a critical memorandum dealing with the proposed uniform law and comparing its provisions with the English law, and making certain recommendations for its amendment in this country.

The points on which the two laws differ are placed by this memorandum in four categories as follows:—

"(a) There are certain points which the English rule is antiquated and inconvenient, or where the law is obscure.

"(b) There are other points where the English and the foreign rule appear to be equally convenient, and where it might be well to adopt the foreign rule for the sake of uniformity after it has been enacted by the Legislatures of a large number of other important mercantile countries, more especially if, after consultation with our colonies and the United States, we find that they will be inclined to follow suit.

"(c) There are points of difference depending on differences in the underlying systems of which supplement the special code as to bills of exchange—the rules, for instance, which depend on the existence of tribunals of commerce, and the special procedure in force in countries where a sharp distinction is drawn between commercial and civil law and between traders and non-traders.

"(d) There are points where, in our opinion, the English law, founded as it is upon the usages of trade and bankers, is distinctly more convenient than the foreign rule."

And with regard to these points Sir M. D. Chalmers and Mr. F. H. Jackson go on to say:—

“If English mercantile opinion is in accordance with our views, we trust that there will be an opportunity to bring our views before the final conference, which will meet about a year hence to shape the draft uniform law into its final and complete form. Although England cannot join in the uniform law, it is important for us that that law should not contain provisions which are inimical to international commerce. Whatever shape the uniform law may eventually assume, it will undoubtedly be advantageous to have only one continental system to deal with, instead of the present multiplicity of divergent laws.”

In the Blue Book containing all the correspondence relating to the conference will be found a translation of the uniform law, employing as far as possible the language of the English Act, and in a parallel column the corresponding provision of the Bills of Exchange Act, 1882, or, where such provision does not exist, a brief explanatory note. This has been prepared by our representatives, and clearly brings out the points of difference, while in their memorandum they discuss the more important points of divergence and the reasons which may be urged in favour of the English or the foreign rule. In the space at our disposal it is manifestly impossible to deal with these matters in detail, but certain suggestions for the amendment of our own law are made which our delegates consider might be carried out at once, as desirable in themselves, without waiting for the adoption by other nations of the uniform law, which must be a matter of some delay as it is not yet in its final form, and will only be finally settled at a second conference.

Those amendments are as follows:—

“1. That days of grace should be abolished.

“2. That when a bill falls due on a non-business day, it should be payable on the next succeeding business day.

“3. That when the sum payable by a bill is expressed more than once in words, or more than once in figures, and there is a discrepancy, the lesser sum shall be the sum payable.

“4. That when a bill is expressed to be payable with interest and no rate of interest is specified, interest at the rate of 5 per cent. shall be understood.

"5. That where the acceptance consists of the simple signature of the drawee, it must be on the face of the bill.

"6. That where a bill is dishonoured by non-acceptance, a party who is liable on the bill may nevertheless accept it for honour.

"7. That payment for honour by the acceptor of a bill shall be prohibited.

"8. That where the holder of a bill loses his right of recourse on the bill by reason of his failure duly to present or protest it, or to give notice of dishonour, he shall not thereby lose his right of action on the consideration, but that if the drawer or indorser whom he sues has been prejudiced by that failure, such drawer or indorser shall be discharged from his liability on the consideration to the extent of any loss he may have suffered."

And it is difficult to see why they should not be forthwith adopted by the Legislature. The authors of the memorandum have also prepared the rough draft of a bill to carry them into effect, consisting of but five short operative clauses, and its passage through Parliament should not be a difficult matter.

There are two other recommendations made in order to simplify our law, namely:—

"1. That the Bank Holiday Acts should be consolidated. They are now three in number, and are not very easy to construe together. It is to be noted that the days appointed for bank holidays differ in England, Scotland, and Ireland.

"2. That the stamp laws relating to negotiable instruments should be consolidated. The Stamp Act, 1891, has now been amended eight or nine times, and the amendments are very complicated."

As to these there can be no possible objection. On the question of stamps, the conference by unanimous resolution, this country, however, standing aside, agreed that non-compliance with stamp laws should never be a ground for nullifying a bill of exchange or a promissory note, and that stamp laws should only be enforced by money penalties. On this, our representatives say that they would rather express no opinion without hearing what the revenue authorities have to say about it, but they point out that in the case of cheques English law relies on the pecuniary penalty. It certainly would seem that an amendment

of the law placing all these negotiable instruments on the same footing would be reasonable, for in the case of contracts, for instance, a penalty is considered sufficient to enforce the requirements of the law.

It will be seen that much might be done in the future to bring the law on bills of exchange more into line, and although, as we have said, a universal law, so far as this country is concerned, is, for the present, impossible, it would be for the advantage of the mercantile community if more uniformity were possible.—*Law Times*.

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#### *AMALGAMATION OF LAW AND EQUITY.*

It is often said, with reference to the Judicature Acts and their effect, that they have failed to do what they were intended to do—to amalgamate the doctrines of law and equity. A typical example of such statements is that contained in a footnote on p. 10 of the introduction to Williams' *Vendor and Purchaser*, where the author says, speaking of *Scott v. Alvarez* (73 L.T. Rep. 43; (1895) 2 Ch. 603) : “This case must have shattered the last ruins of the delusion that law and equity were fused by the Judicature Acts.” No attempt appears yet to have been made to shew, by an ordered exposition of decisions given in the superior courts since the Judicature Acts came into operation, to what extent any fusion or amalgamation of law and equity has taken place, or to what extent the two great bodies of jurisprudence—common law and equity—still remain separate as before the Judicature Acts. That the “law” administered in the superior courts does now include elements of common law and equity more or less blended, instead of being merely fitted into one another like a mosaic, can hardly be denied. But it cannot be denied, on the other hand, that the admixture of law and equity is still rather in the nature of a mechanical mixture than a chemical combination. In fact, so long as any rule of law enforced by the courts can be definitely referred either to the common law system or to the equity system, it cannot be truly said

that the fusion or amalgamation of law and equity is complete. The amalgamation will be complete when it becomes immaterial to inquire whether a particular rule enforced by a court is a rule of common law or a rule of equity. Notwithstanding that this condition of things has not yet been reached, or is not even yet in sight, it is yet possible that a tendency in the direction of such a complete amalgamation may be visible. It is the purpose of this article to indicate how and where this tendency is visible, by referring to a few decisions of the courts which shew that the effect of the system of administering common law and equity together—the system introduced and rendered possible by the Judicature Acts—is to weld together the two bodies of jurisprudence in one undistinguishable whole.

There are some decided cases that shew what may be called the negative side of the tendency towards amalgamation, or the struggle of the two elements of law and equity to keep apart. The decisions and dicta in these cases, though actually retarding the movement of the two elements towards complete union, are nevertheless excellent illustrations of its existence. These cases will be referred to first, and in order of date.

*Foster v. Reeves* (67 L.T. Rep. 537; (1892) 2 Q.B. 255). This was a decision of the Court of Appeal, affirming the Divisional Court, which had reversed the judgment given in the County Court. The action was brought to recover rent under an agreement for a tenancy. The agreement was in writing, but not under seal, and by it the defendant had agreed to take a house for three years from a future date. Defendant took possession, but left before the expiration of the three years. The agreement, not being under seal, was ineffective as a lease at common law, but it was contended that, since in equity the agreement could have been ordered to be specifically performed, the defendant was to be treated as though he were party to an actual lease. This was the doctrine of *Walsh v. Lonsdale* (to be referred to presently). The Court of Appeal, however, held that this doctrine did not apply in the present case, since the County Court had no jurisdiction to order specific performance.

The plaintiff therefore failed to recover, as he would formerly have failed in a court of common law before the Judicature Acts, and was allowed no benefit upon any equitable grounds.

*Scott v. Alvarez* (72 L.T. Rep. 455; 73 L.T. Rep. 43; (1895) 1 Ch. 596; 2 Ch. 603) has been referred to above as the subject of criticism in Williams' Vendor and Purchaser. The author goes to speak of the case as an authority for the proposition that in the same court and the same proceedings "a suitor may at the same time obtain and be denied substantial relief according as his claim is rested on the doctrines of equity or of law," but this condemnation seems too strong. *Scott v. Alvarez* certainly was a singular case. It was a vendor's action for specific performance of a contract to purchase land, and the defendant counterclaimed for a return of the deposit. The vendor had sold under stringent conditions, and the title turned out to be absolutely bad. The Court of Appeal held that the defendant (purchaser) was not entitled to be relieved of his liability under the contract, and could not, therefore, recover the deposit, but that the plaintiff (vendor) was not entitled to an order for specific performance. Lord Justice Lindley described this result as "not altogether satisfactory, but it is a logical consequence of the double jurisdiction of this court and of the extraordinary jurisdiction exercised by courts of equity." As Lord Justice Lopes said: "Specific performance is discretionary, and a court of equity will not decree it where the title is obviously a bad one." The vendor might, of course, have brought an action for damages successfully, and in effect he did succeed in getting damages, for he retained the deposit. To this extent the plaintiff was not "denied substantial relief," and the mere fact that he could not get specific performance is hardly such a "paradox" as Mr. Williams would have us believe, nor is it due merely to law and equity being separate systems not yet amalgamated into one. There is nothing strange in one remedy rather than another being appropriate under certain circumstances. But undoubtedly great stress was laid by the Lords Justices in *Scott v. Alvarez* upon the distinct origins of the two remedies of a claim

for damages and a claim for specific performance of the contract, and the conception of a court simply applying one rather than another of two possible remedies is put aside in favour of a "double jurisdiction" which is quite opposed to any theory of amalgamation. *Scott v. Alvarez* therefore shews the two elements of common law and equity closely interwoven, but refusing to coalesce.

*In Manchester Brewery Company v. Coombs* (82 L.T. Rep. 347; (1901) 2 Ch. 608) Mr. Justice Farwell made some observations on the decision in *Walsh v. Lonsdale* which tend to restrict the application of the doctrine of that case much as it was restricted in *Foster v. Reeves* (sup.). It was said that the doctrine of *Walsh v. Lonsdale* only applied where there was a contract to transfer a legal title, and where specific performance could be obtained between the same parties, in the same court, and at the same time as some legal question involved has to be determined. Here the two elements of law and equity are kept distinct.

In *Worthing Corporation v. Heather* (95 L.T. Rep. 718, at p. 722; (1906) 2 Ch., at p. 540) Mr. Justice Warrington referred to the separate doctrines of law and equity, and took the view that for the purpose of the case before him "the court is sitting as a court of common law." This is exactly on the lines of the three cases already cited, and all four cases are typical illustrations of the juridical attitude which regards the two systems of common law and equity as streams still flowing side by side unmixed.

The first of the cases to be cited by way of illustrating the other attitude of mind—which regards law and equity as gradually intermingling—is *Pugh v. Heath* (46 L.T. Rep. 321; 7 App. Cas. 235). The case related to the right of a mortgagee to recover possession of land. Earl Cairns, referring to possible differences between a legal and an equitable mortgagee's remedies, said: "The court is now not a court of law or a court of equity; it is a court of complete jurisdiction." This observation though only made obiter, is a very strong expression of the

view that amalgamation and not double jurisdiction was the purpose of the Judicature Acts.

In the same month of the same year that *Pugh v. Heath* came before the House of Lords, the case of *Walsh v. Lonsdale* (46 L.T. Rep. 858; 21 Ch. Div. 9) was decided by the Court of Appeal. *Walsh v. Lonsdale* is the strongest case that can yet be cited from the reports in favour of the view that since the Judicature Acts law and equity are tending towards a real amalgamation in English jurisprudence. The action was brought by the plaintiff for illegal distress on the part of the defendant as his landlord. The plaintiff was in possession under an agreement for a lease only, and it was contended that distress for rent could not be justified under a mere agreement. The Court of Appeal thought otherwise. Jessel, M.R. said: "There is an agreement for a lease under which possession has been given. Now, since the Judicature Act the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one court, and equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance." Lord Justice Cotton said the landlord was right "if the lease under which the tenant must be taken to be holding this land or premises would give him rent beforehand." Lord Justice Lindley said: "I also think that the rights of the parties in this case turn upon the lease as it ought to be framed in pursuance of the contract into which these parties have entered." The expression used by Sir George Jessel is "one court"—not a double court.

There are some expressions used in *Warren v. Murray* (71 L.T. Rep. 458; (1894) 2 Q.B. 648), as to rights of entry being barred under the Limitation Acts, which indicate, quite as strongly as direct statements made regarding the Judicature

Acts, the tendency to look on equity as a part of the existing totality of rights and not a separate system of rights. Lord Esher speaks of "the actual legal rights of the parties, including in the words 'legal rights,' equitable as well as common law rights. . . . If the state of things is such that in equity they could not enter, then according to the law, including equity and common law, they could not enter at all."

*Ellis v. Kerr* (102 L.T. Rep. 417; (1910) 1 Ch. 529) was an action on a covenant, which failed by reason of the same persons being both covenantors and covenantees. Mr. Justice Warrington commenced his judgment by saying "that at law, before the fusion of law and equity by the Judicature Act, such an action as this could not have been maintained." The question was: Could the action "be maintained in this court, which is now administering principles both of common law and equity"? These expressions accord rather with the view of a single court of complete jurisdiction than with the view of a court of double jurisdiction.

As a concluding commentary upon the cases cited, the words of Maitland (*Lectures on Equity*, pp. 18, 20) may be quoted: "We ought to think of equity as a supplementary law, a sort of appendix added on to our code, or a sort of gloss written round our code, an appendix, a gloss, which used to be administered by court specially designed for that purpose, but which is now administered by the High Court of Justice as part of the code." And further on: "The day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law; suffice it that it is a well-established rule administered by the High Court of Justice." Maitland may have had in mind Lord Blackburn's words in *Pugh v. Heath* (*sup.*): "Some twenty years ago there might have been some difficulty, in this case, in saying whether the proper form of remedy was by ejectment at law or by a suit in Chancery; but now it is quite immaterial which of the two it is, if it can be shewn that there is a remedy."—*Law Times*.

It is not surprising that a large percentage of lawyers find their way into the various legislatures of the Anglo-Saxon countries, and their presence there cannot be but for the welfare of the people. We have a goodly proportion of them in the various Parliaments of the Dominion and provinces; but the number is not to be compared to the preponderance of lawyers in the legislative halls of the United States. The executive head of that country is a trained lawyer and jurist. In his Cabinet of nine members, he is advised by not less than seven lawyers, most of them distinguished at the Bar. The Senate is composed of ninety-two members, sixty-seven of whom belong to the profession of the law, and the presiding officer of the Senate also belongs to the same body. Two hundred and twelve members of the House of Representatives, which is composed of three hundred and ninety-eight members are also lawyers.

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We learn from an esteemed contemporary that Judge Lawson, Dean of the Law School of Missouri State University, has recently returned from England, where he made an extended study of the criminal procedure of the courts of that country. The information he obtained there has convinced him that the courts of his own land "are a century behind those of England in the matter of criminal procedure." This is a somewhat remarkable admission, and is coupled with the assertion that "American practices leading to international delays and repeated postponements of cases are not known and would not be permitted if attempted in England." The same writer refers to the high standing of the judges of the English courts; speaking of them as being men of the highest type and well paid. Unfortunately, in Canada, as well as the United States, political influence is too strong a factor. The remarks with which the editor of the *Law Notes* concludes his observations has a certain application here as there: "Is it any wonder, then, that our courts are so far below the standard which they ought to attain? They do not appeal to the highest type of lawyers from any point of view, and no attempt is made to secure that type of lawyers for their presiding officers."

**REVIEW OF CURRENT ENGLISH CASES.**(Registered in accordance with the Copyright Act.)

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**FIDELITY BOND—SURETY—DEFAULT OF PRINCIPAL—PENAL INTEREST ON DEFALCATION—LIABILITY OF SURETY.**

*Board of Trade v. Employers' Liability Assurance Corporation* (1910) 2 K.B. 649. This was an action on a fidelity bond given by the defendants to secure the due discharge of his duty by a trustee in bankruptcy, or if he should fail therein that the surety should "make good any loss or damage occasioned to the estate by any such default of the bankrupt." The principal improperly retained £50 in his hands for some years, and on his default being discovered he was removed from office, and pursuant to the Bankruptcy Act he was surcharged with interest at the rate of 20 per cent. per annum on the sum improperly retained. The principal made good the £50 but not the interest, the present action was brought to recover the interest against the sureties. Phillimore, J., who tried the action held that the defendants were liable, but the Court of Appeal (Williams, Moulton and Buckley, L.J.J.) reversed his decision, holding that the 20 per cent. interest was in the nature of a penalty which in a certain event the principal became liable to pay, but it was not covered by the language of the bond, so as to make the surety liable therefor, the principal on failure to pay this interest not being a breach of his duty as a trustee, and the penal interest for which he became liable not being a loss to the estate.

**COMPROMISE—SOLICITOR'S AUTHORITY TO COMPROMISE ACTION—ASSENT OF CLIENT GIVEN UNDER MISUNDERSTANDING.**

In *Little v. Spreadbury* (1910) 2 K.B. 658. In this action before it came on for trial, the solicitors of the parties arrived at a settlement and a memorandum thereof was signed by the solicitors. This memorandum was read over to the defendant by her solicitor or his son and the defendant seemed to assent to it, and thereupon the action was by consent of both sides struck out. It turned out afterwards that though the defendant seemed to

assent to the terms of settlement she did not in fact understand them, and did not mean to assent to them, and upon an agreement in writing containing the terms of the memorandum being submitted to the defendant for her signature she repudiated the settlement and refused to sign the agreement. The present action was to recover damages for breach by the defendant of the terms of settlement. The County Court Judge who tried the action held that the compromise in the circumstances was not binding and dismissed the action, but the Divisional Court (Bray and Coleridge, JJ.) reversed his decision on the ground that the defendant had led her solicitor to believe that she assented, and was consequently bound by his act.

## Correspondence

### APPEALS TO THE PRIVY COUNCIL.

To the Editor, CANADA LAW JOURNAL.

DEAR SIR,—

The decision of the Privy Council in the recent case of *Gordon v. Horne* (see 42 S.C.R. 240) calls for notice, as I think, not only from the profession, but from Canadians generally. In this case the Privy Council reversed the decision of the trial judge upon a pure question of fact, which decision had been affirmed by a majority of the Supreme Court of Canada.

The details of the case are not material. It is sufficient for the present purpose to say that it was common ground that the question presented for determination was purely one of fact, each party in his factum stating the question, to be what were the terms of a certain verbal agreement. The plaintiff gave one version of it, and the defendants quite another. The trial judge said in dismissing the plaintiff's action: "I accept Horne's evidence and believe it implicitly." Horne was the principal defendant in the suit. A majority of the Supreme Court of Canada consisting of the Chief Justice and Davies and Duff, JJ., said that after a careful consideration of the evidence they agreed with the trial judge.

One would have thought that their Lordships of the Judicial Committee might have left the final determination of such a matter to our own Canadian courts, assuming in them the requisite ability to deal with such a simple matter as the credibility of witnesses. It cannot be gainsaid that upon a question as to which of two parties is to be believed the judge who saw and heard the parties give their evidence is more likely to form a right judgment than judges who have not had that opportunity, and when, as in this case, such judge's decision was concurred in by four other Canadian judges, was it likely that the ends of justice would be better served by substituting for that opinion the view of four English judges sitting in Downing Street? The judicial misadventure in this case is that while five Canadian judges including the one who saw and heard them give their evidence believed the defendants, four others sitting in England preferred to believe the plaintiff. Lord Mersey, de-

livering the judgment of the Board and referring to Horne's evidence, says: "Their Lordships are unable to accept this statement." We pay our money and we take our choice. Locally, of course, there will be those who think that the estimate formed of a witness's credibility by Canadian judges is perhaps more likely to be correct than the one formed in London, and there are reasons why this should be so. The latter had no opportunity of observing the demeanour and appearance of the parties as they gave their evidence. Perhaps none of their Lordships had ever set foot in Canada and probably none of them have had any personal experience of a real estate boom in a Western town. The litigation originated in such local condition.

It is making a demand on "loyalty" and upon the imagination which neither will stand to ask us in Canada to believe that the question of which of two parties to a law suit ought to be believed can be more righteously decided in England than here.

A Board consisting of Lord Macnaghten, Lord Atkinson and Sir Arthur Wilson saw fit to grant leave to appeal in this case and they must therefore have considered that the opinion of the Judicial Committee on the question of which of these parties was to be believed would be superior to that formed by two Canadian courts, and this is not flattering to our Canadian judiciary, nor is it a view likely to be acquiesced in in Canada. It is said that the right of appeal to London is a bond of union with the Empire, but if the Judicial Committee is going to adopt a practice of entertaining appeals of this nature and of interfering with Canadian judgments in cases of this kind, it is likely in time to prove the reverse. If our Canadian judiciary is not adequate in point of ability to the determination of such a point as *Gordon v. Horne* presented, it ought to be made so, but Canadians believe that it is quite capable of deciding such matters and as we have some pride in our judiciary it is not flattering to our self-esteem to find judgments of our Supreme Court of Canada upon such questions brought over to Downing Street by order of the Judicial Committee for review by their Lordships. Is it lack of the necessary brains and legal talent to decide our own civil disputes that makes us submit them to London for adjudication or is the reason a purely sentimental one that we are in this way helping to maintain a union with the Empire or is it a feeling that the judges in London are free from influences or prejudices of an outside or local nature from which judges in our own country might not be free?

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A word as to the cost of indulging this sentiment or whatever it is that leads us to have the judgments of our own courts reviewed in England. The party dissatisfied with the judgment of the Supreme Court of Canada in this case employed a galaxy of legal talent in London. As solicitors he had Messrs. Armitage, Chapple and Macnaghten. As counsel, Sir Robert Finlay and Hon. M. M. Macnaghten, on the application for leave, and, on the hearing of the appeal, Mr. Buckmaster, K.C., and Hon. M. M. Macnaghten. A board consisting of Lord Macnaghten, Lord Atkinson, Lord Mersey and Lord Shaw heard the appeal and reversed the decision, and the taxed costs the losing party had to pay the above solicitors and counsel amounted to \$2,223, besides which he had his own solicitors and counsel to pay. The situation in Canada therefore is something like this. A man may establish his credibility to the satisfaction of the judge who saw and heard him, and of a majority of the Canadian judges before whom the case may come on appeal, but he is nevertheless liable to be summoned to London, England, and there learn that the Canadian judges were wrong in their estimate of him and be mulcted in thousands of dollars of costs.

There is still another aspect to the question of the advisability from a Canadian standpoint, of appeals to London in civil matters. It is probably safe to say that fifty per cent. of the population of Vancouver are Americans. A like condition probably prevails in the prairie Provinces of Alberta, Saskatchewan and Manitoba. Into the provinces West of the Great Lakes, there has been a tremendous immigration of citizens of the United States and that immigration still continues. Sentiment, if it survives at all as regards the Western provinces, must give way to economic conditions. This element will see little sense in travelling across the Atlantic to have their law suits determined by English judges at enormous expense, when in their own country of origin they have been able to obtain a Supreme Court for the final determination of litigation the equal of any court existing in England. If they have been able to do this, why should Canadians not be able to do so? If it is deemed unwise to entrust the Canadian judiciary with the final determination of constitutional questions or of questions of great public interest, or of cases involving grave questions of law, by all means let us have them decided in England. It is not the writer's opinion, nor the opinion of many other Canadians that it should be

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deemed necessary to send even such questions as these to England for final determination.

With great submission the writer maintains that the Judicial Committee of the Privy Council ought not to interfere with the decision of the courts of any part of the Empire in cases of any other description than those above mentioned, that when it interferes with judgments of courts of last resort in the colonies in cases of minor importance such as *Gordon v. Horne*, if it does not inferentially belittle such courts in the estimation of the public it at all events puts litigants to a burdensome and grievous expense, and that it misconceived its functions in granting leave to appeal in *Gordon v. Horne* and in reversing the judgment of the trial judge and of the Supreme Court of Canada in that case.

I have written this letter with a view to suggesting the desirability from a Canadian point of view of some understanding being come to if practicable as to how far the "grace" of the Sovereign ought to be extended in the matter of reviewing decisions of the Supreme Court of Canada and of pointing out the difficulties the Canadian litigant labours under if the decision of two concurrent courts in his favour upon a pure question of fact is to be reviewed by the Judicial Committee of the Privy Council and, as happened in this instance, reversed.

Eight thousand miles is a long distance for a party to travel for the purpose of endeavouring to demonstrate that the judges in his own country correctly estimated his credibility.

Yours truly,  
W. S. DEACON.

Vancouver.

[We refer to this in our editorial columns.—ED. C.L.J.]

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REPORTS AND NOTES OF CASES.

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**Dominion of Canada.**

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**EXCHEQUER COURT**

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Cassels, J.]      ADELINE PARENT *v.* THE KING.      [May 4.

*Government railway—Injury to the person—Vehicle on crossing—Speed of train—Sec. 34, R.S. 1906, c. 36—Faute commune—Reckless conduct of driver of vehicle—Identification.*

*Held*, 1. As the point where the accident in question occurred was not a "thickly peopled portion of a . . . village," within the meaning of s. 34 of R.S. 1906, c. 36, the officials in charge of the engine and train were not guilty of negligence in running at a rate of speed greater than six miles an hour. *Andreas v. Canadian Pacific Ry. Co.*, 37 S.C.R. 1, applied.

2. Under the law of Quebec where the direct and immediate cause of an injury is the reckless conduct of the person injured the doctrine of *faute commune* does not apply, and he cannot recover anything against the other party.

3. Where a person of full age is injured in crossing a railway track by the reckless conduct of the driver of a vehicle in which he is being carried, as between the person injured and the railway authorities the former is identified with the driver in respect of such recklessness and must bear the responsibility for the accident.

*Mills v. Armstrong (The Bernina)*, L.R. 13 A.C. 1, referred to and distinguished.

*Lemeiux, K.C.*, for suppliant. *Chrysler, K.C.*, for the Crown.

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Cassels, J.]      [Sept. 16.

HAVELock McCOLL HART *v.* THE KING.

*Railways—Siding—Undertaking in mitigation of damages in prior suit—Right of suppliant to maintain action.*

In certain expropriation proceedings between the Crown and the suppliant's predecessor in title, the Crown, in mitigation of damages to lands not taken, filed an undertaking to lay down and maintain a railway track or siding, in front of, or adjoin-

ing, said lands and to permit the then owner, "his heirs, executors, administrators, assigns (and the owner or owners for the time being of the said lands and premises or any part thereof and each of them) "to use the same for the purpose of any lawful business to be carried on or done on the said lands or premises." By order of Court the suppliant's predecessor in title was declared to be entitled to the execution of such undertaking. The undertaking was given in 1907, and at that time the lands in question were not being used for any particular purpose. The Crown in execution of its undertaking subsequently laid down a siding in front of or adjoining the said lands. There was, however, a retaining wall between the siding and such lands, and the Crown informed the solicitor of the suppliant on the 5th October, 1909, that "at any time you may desire, we are prepared to open a way through this retaining wall so as to give access to the siding in order that you may conduct your business in the manner contemplated in the order of the Court"; but, although the suppliant presented his claim for damages on the basis that the Crown had not given him a siding suitable for carrying on a corn-meal milling business, at the time of the institution of the present proceedings nothing had been done to utilize the property for any particular business.

*Held*, that upon the facts the Crown had fully complied with the terms of the undertaking mentioned, and that the suppliant had not made out a claim for damages.

*Quaere*, whether the suppliant had any right to take proceedings to compel the execution of the undertaking by the Crown until the property was occupied for the purposes of some business.

2. Whether the suppliant would have any right to enforce a claim for damages in view of the fact that he had no assignment of any such claim from his predecessor in title.

*W. B. A. Ritchie*, K.C., and *E. P. Allison*, for suppliant.  
*R. T. McIlreith*, K.C., and *C. F. Tremaine*, for the Crown.

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Cassels, J.]

[Oct. 3.

IN RE EUGENE MICHAUD v. THE KING.

*Contract—Railway ties—Inspection—Inspector exceeding authority in respect of acceptance—Subsequent rejection of ties improperly accepted—Right to recover price.*

The suppliant, in reply to an advertisement calling for tenders for ties for the use of the Intercolonial Railway offered

to supply ties to the Crown for such purpose. The Crown expressed its willingness to purchase his ties provided they answered the requirements of the specifications mentioned in the advertisement for tenders. D., an inspector appointed by the Government, in excess of his authority and contrary to his instructions, undertook on behalf of the Crown to accept ties not up to the said specifications. On this becoming known to the Crown, D.'s inspection was stopped, and other persons were appointed to re-inspect the ties, who rejected a portion of those which D. had undertaken to accept. The suppliant claimed the price of the ties so rejected.

*Held*, confirming the report of the Registrar, as referee, that the Crown was not liable for the price of the ties which its inspector, wrongfully and in excess of his authority, had undertaken to accept.

*F. St. Laurent*, for suppliant. *Chrysler*, K.C., for the Crown.

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Cassels, J.]

[Oct. 6.

**IN RE JAMES M. JOHNSTON v. THE KING AND FREDERIC COUSE v.  
THE KING.**

*Commissioners National Transcontinental Railway—Contract—  
Services connected with construction of eastern division—  
Disputed claim—Petition of right—Liability of Com-  
missioners.*

A petition of right will not lie in the case of a disputed claim founded upon a contract entered into with the Commissioners of the National Transcontinental Railway for services connected with the construction of the Eastern Division of such railway. Under the provisions of 3 Edw. VII. c. 71, the Commissioners are a body corporate, having capacity to sue and be sued on their contracts. Action, therefore, upon such a claim should be brought against the Commissioners and not against the Crown.

*Travers Lewis*, K.C., for suppliants. *C. J. R. Bethune*, for the Crown.

Cassels, J.]

[Nov. 2.

**THE KING v. JANE MARY JONES.**

*National Transcontinental Railway—Lands taken by Commissioners—Compensation—Arbitration—Jurisdiction of Exchequer Court—Construction of statutes.*

Section 13 of 3 Edw. VII. c. 71, reads as follows:—

“The Commissioners may enter upon and take possession of any lands required for the purposes of the Eastern Division, and they shall lay off such lands by metes and bounds, and deposit of record a description and plan thereof in the office for the registry of deeds or the land titles office for the county or registration district in which such lands respectively are situate; and such deposit shall act as a dedication to the public of such lands, which shall thereupon be vested in the Crown saving always the lawful claim to compensation of any person interested therein.”

*Held*, that, under the terms of section 15 of the above Act (read in connection with the provisions of the Railway Act (R.S. 1906, c. 37)), when lands have been taken and become vested in the Crown as provided by section 13, and the Commissioners cannot agree with the owner thereof as to compensation for the same, such compensation must be ascertained by a reference to arbitration, and not by proceedings taken in the Exchequer Court for such purpose.

*National Transcontinental R., Ex p. Bouchard*, 38 N.B.R. 346, not followed.

*Newcombe*, K.C., for the Crown. Nem. con.

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## Province of Nova Scotia.

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### SUPREME COURT.

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Graham, E.J.—Trial.]

[Oct. 1.

**MILLET v. BEZANSON ET AL.**

*Trespass—Crown grant—Erroneous description—Burden of proof.*

In an action for trespass to land by cutting logs plaintiff's title was derived under a grant from the Crown in which his land was described as lots Nos. 5, 6, and 7 in the second division of Block letter C., and as being bounded on the east by the rear lines of lots 16, 17, and 18 of the first division, Block letter B.

*Held*, 1. The burden of proving title was upon plaintiff.

2. Evidence was receivable consisting of acts of occupation, conveyances, submission to arbitration and a preliminary survey made by a deputy Crown land surveyor and produced from the files of the Crown land office, to shew that the words of the description referring to the numbers of lots on the rear line of the first division were used inadvertently for numbers 15, 16 and 17, and that the lot in dispute was not, therefore, within the limits of the grant under which plaintiff claimed.

*DesBarres v. Shey*, 29 L.T.N.S. 592, referred to.

Paton, K.C., for plaintiff. Mellish K.C., and Kenny, for defendants.

Longley, J.—Trial.]

[Oct. 19.

PITTS v. CAMPBELL.

*Landlord and tenant—Distress—Action by judgment creditor—Claim of fraudulent collusion—Bill of sale set aside—Costs.*

The defendant, C., leased premises to M. and G. who for a time carried on business therein. M. and G. becoming insolvent, executed a bill of sale to C. which covered all their stock-in-trade. There being a doubt as to the legality of the bill of sale under the circumstances C. proceeded against the goods by way of distress for the amount of rent then due, and the goods being suffered by M. and G. to remain upon the premises, C. levied a second and third times for rent accruing subsequently and in this way secured the whole value of the goods.

*Held*, at the suit of plaintiff, a judgment creditor, that the bill of sale must be set aside as tending to hinder and delay creditors, etc., but that in the absence of stronger evidence of fraudulent collusion between the landlord and tenants his claim for an accounting must be refused.

*Held*, nevertheless, that as plaintiff was justified under the circumstances in making his claim for an accounting, defendant must be refused costs of the claim dismissed.

D. McNeil, for plaintiff. Gallant, for defendant.

Longley, J.—Trial.]

[Oct. 19.

MONAGHAN v. MCNEIL.

*Intoxicating liquors—Wrongful seizure by Inspector—Action against.*

Plaintiffs who were wholesale and retail liquor dealers in the city of H. shipped a quantity of intoxicating liquors to the

county of Inverness where the Liquor License Act was in force. The goods were consigned to plaintiff's own order and had not yet been delivered to the parties for whom they were intended. The goods were seized by the Inspector for the county but of his own motion and without having taken any of the proceedings for their seizure and confiscation provided by the Act.

*Held*, that plaintiffs being the owners of and having full control over the goods at the time of their seizure were entitled to recover the full value thereof against the Inspector.

*D. McNeil*, for plaintiffs. *Gallant*, for defendant.

Graham, E.J.—Trial.]

[Oct. 20.

LEHIGH VALLEY COAL CO. v. KING.

*Sale of goods—Terms of contract—Free discharge—Evidence as to memorandum in writing—Effect of.*

Plaintiff company through one of their agents sold a quantity of coal to defendant and agreed to secure a vessel to carry the same at the rate of ninety cents per ton, which defendant subsequently agreed to increase to \$1 per ton. Plaintiff's agent wrote his principals on the same day that the contract was made informing them that the terms of the contract were ninety cents freight and "free discharge," but in a memorandum of the terms of contract delivered to the defendant at the time of the making of the contract these words were not mentioned and defendant denied that they were discussed or agreed to.

*Held*, that, defendant had a right to rely upon the terms of contract as stated in the memorandum and that his version of the agreement supported by the memorandum must be adopted and that he was entitled to recover from plaintiff company the amount paid out by him for delivery in order to obtain possession of the coal.

*J. J. Ritchie*, K.C., for plaintiff. *Daniels*, K.C., for defendant.

Graham, E.J.—Trial.]

[Oct. 20.

TAYLOR v. MC LAUGHLIN.

*Sale of goods—Term F.O.B.—Effect of—Error as to date—Actual date may be shewn.*

Defendant ordered from plaintiffs, manufacturers of safes, at Toronto, a safe of specified description and value, the safe to be delivered by plaintiffs F.O.B. Toronto, and to be paid for by defendant in one instalment, net cash, without interest.

The evidence shewed that the contract was made October 10, 1907, and was approved by plaintiffs a few days later, but by an error made by one of plaintiffs' employees the approval was made to appear as if made at a much later date and subsequent to the date of a letter in which defendant sought to rescind the contract.

*Held*, that, the date was not material and that the actual date could be shewn.

The printed form of contract contained a provision under which the title to the safe was to remain in plaintiffs until the whole of the purchase money was paid and these words were not struck out although they appeared to be applicable to cases where goods were sold on credit or the instalments were to extend over a period of time.

*Held*, that, while in the ordinary course the agreement for delivery F.O.B. would pass title, the court would not be justified in rejecting the clause not struck out retaining title in the plaintiffs until performance of the conditions provided for.

*J. J. Ritchie, K.C., for plaintiffs. J. M. Owen, for defendant.*

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Graham, E.J.—Trial.]

[Oct. 28.

BROOKES *v.* BROOKES.

*Deed—Action claiming reformation—Laches—Limitation of actions.*

Plaintiff brought an action to reform a deed made twenty-seven years previously, as to one lot of land included therein, on the ground, chiefly, that at the time the deed was made the lot of land in question was claimed by and was supposed to belong to defendant, under the will of the original owner. Defendant admitted that he had always asserted a claim to the land as alleged, but there was evidence shewing that plaintiff a number of years before action was brought became aware of the existence of the deed under which he claimed, and although he then knew of the will and the deed and of the claim asserted by defendant he took no steps to ascertain what his rights were. Since then defendant had sold the greater part of the land to a purchaser without notice.

*Held*, that, plaintiff had been negligent and that it was now too late to afford him relief.

The Statute of Limitations being pleaded plaintiff's only answer, after such a long lapse of time, would be that he did not discover the mistake until the very eve of the action.

*Chesley*, K.C., for plaintiff. *Roscoe*, K.C., and *Grierson*, for defendant.

Longley, J.—Trial.]

[Nov. 3.

ATTORNEY-GENERAL EX REL. MORRISON v. LANDRY.

*Trusts—Creation—Rights of cestui que trust—Enforcement of—School district—Ratepayers—Rights of minority—Proceedings in name of Attorney-General.*

A sum of money raised by public subscription and in other ways was placed in the hands of the defendant L. and two others as trustees to purchase a house as a place of residence for the members of a religious Order then teaching in the public school of section 8 of the parish of D. and a memorandum was drawn up and signed by L. and his co-trustees in which it was set out that the place of residence to be purchased with the funds placed in their hands for that purpose was to be maintained, by the Order so long as the members thereof remained at D., but in the event of their leaving the house was to become the property of the section and the trustees then holding office were to sell the house for the purposes of the school or the benefit of the section. L. and his associates acquired a property for the purpose intended, but took the deed to themselves without any qualification and the following day executed a deed to the Order in fee simple and without any reservations. Some months later the members of the Order decided to leave the province, and before doing so gave a deed in fee simple of the property to L. who proceeded to mortgage it to his brother F. L. to secure the sum of \$700.

*Held*, 1. F. L. having been present at the meeting of ratepayers when the trustees were appointed must be held to have taken his mortgage with notice of the trust.

2. There being a trust in favour of the ratepayers generally the interests of the minority could not be affected by a resolution illegally passed by the majority instructing the discontinuance of proceedings against the trustees and that the present proceedings were properly brought in the name of the Attorney-General.

3. The trustees of the section had power under the Education Act, R.S.N.S. c. 52, s. 55, to accept a gift of property for the benefit of the section.

Ordered that defendants be declared to hold the property in trust for the ratepayers of the section and that they be required to execute a conveyance of the property to the trustees of the section free of incumbrances.

*Wall*, for plaintiff. *Ritchie and Robertson*, for defendants.

Graham, E.J.—Trial.] PARKER v. BLIGH. [Nov. 3.

*Pledge of goods to secure advances—Tender—Requisites of.*

Where goods are pledged as security for money advanced the bare refusal of the pledgee, without more, to deliver up the goods held for payment does not dispense with the production of the money by the person offering to pay the charges and asking for delivery of the goods.

*J. J. Ritchie, K.C., and Miller, for plaintiff. Roscoe, K.C., for defendants.*

Graham, E.J.—Trial.] [Nov. 4.  
MESSENGER *v.* STEVENS.

*Animals—Breachy cow—Liability of owner for damage caused by—Circumstantial evidence.*

In an action claiming compensation for injuries to his cow resulting in its death, alleged to have been caused by a cow owned by defendant, the evidence was wholly circumstantial. During the morning plaintiff placed his cow in his pasture where there were no other animals. Sometime after noon defendant's cow, which was known to be a breachy animal, was found in a neighbour's oatfield and was driven out and into a lane adjoining plaintiff's pasture. Very shortly after, the fence between the lane and the pasture was found to have been broken, there were tracks leading to the place in the pasture where the injured cow was found lying, and there were marks on the ground which shewed that two animals had been engaged in a struggle there, the footprints corresponding in point of size with the two animals in question, the one being large and the other small.

*Held*, that the evidence led to the conclusion that the injuries were inflicted by defendant's cow, and that plaintiff was entitled to recover the proved value of his cow with costs.

*Naas v. Eisenhaur*, 41 N.S.R. 424, distinguished. *Lee v. Riley*, 18 C.B.N.S. 722, followed.

*Roscoe, K.C., and Miller, for plaintiff. J. J. Ritchie, K.C., for defendant.*

## Province of Manitoba.

### KING'S BENCH.

**Macdonald, J.]** [August 26.

**PATTERSON v. CENTRAL CANADA INS. CO.**

*Fire insurance—Meaning of words “stored or kept” in relation to gasoline on premises—Excessive claim for loss as a defence to action on policy—Provision in policy for settlement of amount of loss by arbitration.*

1. The proper construction to be given to the words “stored or kept” in a condition of a fire insurance policy providing against liability of the company for loss or damage occurring while gasoline, etc., is stored or kept on the premises, is that they do not apply to a small quantity kept on hand for domestic purposes, but import the idea of warehousing or depositing for safe custody or keeping in stock for trading purposes.

*Thompson v. Equity Fire Ins. Co.*, Privy Council decision not yet reported, but reversing 41 S.C.R. 491, followed.

A clause in a policy of fire insurance providing for the settlement of the amount of the loss or damage suffered by the insured by arbitration, whether the right to recover is disputed or not and independently of all other questions, unless made by the policy a condition precedent to the right to bring an action, will not prevent the insured from suing without taking any steps towards such arbitration.

*Scott v. Avery*, 5 H.L. 811, and *Caledonia Ins. Co. v. Gilmour* (1893) A.C. 85, followed.

The goods, insured for \$1,000 were valued at \$1,400 in the application. After the fire, the plaintiff in his proofs of loss swore that his loss was \$2,359.50, but the trial judge estimated the loss at only \$400.

*Held*, that this inflation of values was not fraudulent to the extent of vitiating the policy.

*Howell and Garland*, for plaintiff. *S. H. McKay*, for defendants.

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**Prendergast, J.]** [August 18.

**WINNIPEG OIL COMPANY v. CANADIAN NORTHERN RY. CO.**

*Railway Act, R.S.C. 1906, c. 37, s. 298—Evidence—Fire started by sparks from locomotive.*

The plaintiff's premises, adjoining the defendants' railway, were discovered to be on fire about five minutes after the pas-

sage of one of the defendants' trains, hauled by two engines up a heavy grade. It was proved that the wind at the time would have carried any sparks from the locomotives directly towards the premises and that it is usual for engines, under such circumstances, although well and properly equipped, to throw off sparks and cinders. The evidence also satisfied the judge that it was in a high degree improbable that the fire could have been caused in any other way, although no negligence in the operation of the train was shewn and no one saw any sparks alight.

*Held*, that there should be a finding that the fire was caused by sparks from the engines and that the plaintiffs were entitled to a verdict under s. 298, R.S.C. 1906, c. 37.

*Tate v. C. P. R.*, 16 M.R. 391, followed.

*Affleck and Fillmour*, for plaintiffs. *Clark, K.C.*, for defendants.

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Prendergast, J.]

[Sept. 6.

NORTH-WEST THRESHER CO. v. BOURDIN.

*Fraudulent conveyance—Purchase of land from provincial government—Lien on land created by purchaser—Subsequent transfer of purchaser's interest to third party.*

The defendant Bourdin purchased the land in question from the government of Manitoba in May, 1904, paying \$64 on account and agreeing to pay the balance in yearly instalments. In January, 1905, he created a lien on the land in favour of the plaintiffs, who registered it. He made no further payments to the government, but put improvements on the land estimated at \$100. He gave a quit claim deed of it in August, 1906, to the defendant, Le Seach. The Land Department ignored the lien of the plaintiffs and, upon Le Seach paying the balance of the purchase money, issued a patent for the land to him.

*Held*, that it should be inferred from these facts that the government had treated Bourdin's interest in the land as forfeited because of his default in payment and had intentionally set aside the plaintiffs' registered lien, and that the patent to Le Seach could not be set aside for improvidence or on any other ground.

*Kilgour*, for plaintiffs. *Bowman*, for defendants.

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Robson, J.]

CASS v. CANADA TRADERS.

[Sept. 8.

*Real Property Act—Caveat—Petition of caveator must be founded on caveat.*

A caveat filed under s. 133 of the Real Property Act, R.S.M. 1902, c. 148, must accurately set forth the title, estate or interest in the land claimed by the caveator, and a petition filed by the caveator after notice served upon him by the caveatee, under s. 131 of the Act, requiring the caveator to take proceedings upon his caveat, must be one asserting substantially the same title, estate or interest as that stated in the caveat, or it will be dismissed.

*McArthur v. Glass*, 6 M.R. 224; *McKay v. Nanton*, 7 M.R. 250, and *Martin v. Morden*, 9 M.R. 565, followed.

*Hough*, K.C., for caveator. *L. J. Elliott*, for caveatee.

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## Province of British Columbia.

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### SUPREME COURT.

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Clement, J.]

REX v. SCHYFFER.

[Oct. 21.

*Criminal law—Arrest on telegram—Legality of—Criminal Code ss. 30, 33, 347, 355 and 649.*

The applicant had been arrested, without a warrant, by the chief of police for Vancouver at the instance of a private detective there who had received a telegram from a private detective in Montreal. The offence alleged was that the accused had, in Montreal, received a ring with instructions to hand it over to a third person. A second ring he had, as alleged, stolen from such third person directly. He converted it to his own use and left for British Columbia.

*Held*, that this was not an offence within the meaning of Crim. Code s. 355 for which an arrest could be made without a warrant.

*S. S. Taylor*, K.C., in support of the application. *J. K. Kennedy*, contra.

Hunter, C.J.]

[Oct. 10.

MOORE v. CROW'S NEST PASS COAL Co.

*Practice—Workmen's compensation—Pleadings—Power of arbitrator to allow applicant to amend his particulars.*

An arbitrator appointed under the Workmen's Compensation Act, 1902, has the same power as to amendments of pleadings in proceedings before him as a judge has in a civil action.

*Eckstein*, for the applicant. *G. H. Thompson*, for respondent company.

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Murphy, J.]

REX v. FORSHAW.

[Oct. 27.

*Municipal law—Certiorari—Power to impose license—Discrimination between vehicles drawn by horses used for hire and vehicles propelled by power—Vancouver Incorporation Act, 1900.*

Pursuant to sub-ss. 130 and 131, of s. 125, of the Vancouver Incorporation Act, 1900, empowering the council to regulate and license owners and drivers of stage coaches, livery, feed and sale stables and of horses, drays, express waggons, carts, cabs, carriages, omnibuses, automobiles and other vehicles used for hire, the council passed a by-law imposing a license for each vehicle drawn by one or two horses, \$5 per annum; by more than two horses, \$10; and for each automobile or taxicab carrying up to seven passengers, \$25; over seven passengers, \$50 per annum. On an application for a writ of certiorari to bring up a conviction under the by-law on the ground that it made a discrimination between vehicles drawn by horses, used for hire, and other vehicles used for hire,

*Held*, that the conviction was valid.

*Reid*, K.C., for the application. *J. K. Kennedy*, for the city, contra.

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Full Court.]

[Oct. 27.

WHITE v. MAYNARD &amp; STOCKHAM.

*Principal and agent—Sale of land—Commission—Purchaser found by agent—Owner giving subsequent option for sale to third party—Sale by such third party to purchaser found by agent.*

An owner who had listed his property with an agent for sale on certain terms, subsequently gave an option for sale to a third

party. The latter, when the time for taking up his option arrived, had the property conveyed directly to a party originally found by the agent, and with whom the agent was negotiating for a sale. The purchase price was the same in both cases.

Held, on appeal, reversing the finding of Lampman, Co. J., at the trial, that the circumstances connected with the granting of the option precluded any idea of a mere agency on the part of the option holder, and his position as purchaser was not affected by the fact of his selling to the purchaser with whom the agent was negotiating.

### Book Reviews.

*A treatise on the effect of the Contract of Sale on the legal rights of property and possession in goods, wares and merchandise.* By LORD BLACKBURN. Third edition by W. N. Raeburn and L. C. Thomas, with Canadian notes by Hon. Mr. Justice Russell, of the Supreme Court of Nova Scotia. London: Stevens & Sons, Limited. Toronto: Canada Law Book Company, Limited. Philadelphia: Cromarty Law Book Company, Limited, Law Publishers. 1910.

Nothing need be said to the profession as to the scope and character of this, one of the best of English law books, but it is well to call attention to the new departure of including in the present edition notes of all Canadian cases which appropriately find their place in such a treatise as this. No one could be found in this country more competent for this task than Mr. Justice Russell, both a lawyer and a scholar, whose legal training and present position peculiarly fit him for giving the profession the best that can be given in the premises.

The preface to the Canadian notes tells its own story:—

"An endeavour has been made to include in the Canadian notes a statement of the point decided in every important case to be found in the reports and wherever the point raised has been one of special importance or difficulty, an outline of the reasoning has been given. Several cases have been omitted in which the point raised has been merely the application of a well-recognized principle to circumstances of no special complexity, but the annotator is pretty confident that no case decided in any court in Canada has been omitted which is not of a negligible character."

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*The Law Quarterly Review.* London: Stevens & Sons, Limited, 119-120 Chancery Lane.

The October number of this Review, edited by Sir Frederick Pollock, contains the usual interesting notes on current cases, as well as the following articles, contributed by writers of eminence: The Native States of India, Limitations of the powers of Common Law Corporations, Burgage Tenure in Mediæval England, The Co-operative Nature of English Sovereignty, The Shoreditch Assessment case, The Newport Dock dispute, The Jurisdiction of the Inns at Court over the Inns of Chancery, Hallam and the Indemnity Acts, Hospital ships and the carriage of passengers and crews of destroyed prizes, A Note on the Hague Award in the Atlantic Fisheries Arbitration; all excellent and interesting reading.

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### **Flotsam and Jetsam.**

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**ANCIENT CEREMONIES AND RENT CUSTOMS:**—Certain officers of the corporation of the city of London attended recently before the King's Remembrancer, in open court in the High Court of Justice, to perform a certain ancient ceremony and to render certain quit rents and services on behalf of the corporation due for lands and tenements in the counties of Salop and Middlesex. The proceedings took place in one of the courts erected in the Judge's Quadrangle, in the presence of a number of visitors. The proceedings opened with a short account of the ceremony given by Master Mellor. He said that the services had been rendered for about 700 years in open court. When these services were established it was not usual to pay rent in money. The piece of land in Shropshire was woodland and that in Middlesex was a piece on which originally a blacksmith's forge had stood. Then followed the rendering of the quit rents and services. The city solicitor (Sir Homewood Crawford) cut one fagot with a hatchet and another with a billhook. He then counted out six horseshoes and 61 nails. At the end the King's Remembrancer said, "good number."—*Times*.

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We have reason to be proud of our administration of the criminal law, and justly so, for the two recent trials at the Old Bailey of Dr. Crippen and Miss Le Neve afford excellent ex-

amples of our criminal justice—speedy, thorough, and impartial. There is one matter, however, to which we desire to refer, for it is to be hoped that this will be the last occasion upon which we shall have the very unedifying spectacle of seeing any of our criminal courts practically turned into a theatre. Publicity in trials of this nature is, of course, essential, but the court itself should be reserved for those whose business it is to be present, including the press; while those members of the public who desire to satisfy their morbid curiosity should be relegated to the public gallery, and that on the principle of first come, first served. The ticket system is objectionable in the highest degree, and we sincerely trust that for the future His Majesty's judges will take care that there shall be no repetition of the incidents of these trials.—*Law Times*.

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The misrepresentation of a servant as to his age in his contract of employment to a railroad company does not affect his right to recover for injuries, unless his immaturity immediately contributed to such injures.—Supreme Court, Alabama, July 6.

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THE MOTOR FIEND:—"The motor-car is now a recognized institution in this country. It is all the more necessary, therefore, to control its vagaries. The railway companies on their own lands are heavily mulcted for any accident because they can be brought to book," says the *Broad Arrow—The Naval and Military Gazette*. The motor fiend rushes through lands and over roads for which he pays little or nothing, kills human beings and animals, and, unless his number can be taken, drives off scot-free. Not only does he amuse himself at the risk of life, but he even pays myrmidons to enable him to evade the police. This is bad enough on the great high roads, but side-roads, with no foot-paths, are almost equally at the mercy of these selfish individuals.—*Exchange*.

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MODERN NEWSPAPERS:—"Time was—middle-aged people can remember it—when English newspapers were a model and an example to the world's Press," says the *Saturday Review*. "Now, every crowded thoroughfare is blatant with the latest thing in horror and lubricity. We cannot quite see why this nuisance should be tolerated. Grant that everything stated in a

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court of law may be reproduced for popular sale, it does not follow that the advertisement of it should be permitted." This sort of thing is not an inherent privilege of citizenship.

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**DEFAMATION:** Publication of fiction purporting to be "news"—A libel without justification.—The circumstances of the case of *Snyder v. New York Press Co.*, 121 N.Y. Suppl. 944, were somewhat extraordinary. A short newspaper article was published to the effect that, upon the assurance of a process server that Mrs. Snyder was anxious to see him, the naïve Irish maid admitted him to the bathroom while she was in the bath tub; that the mistress screamed, but was nevertheless served with a subpoena; and that motion was made to have subpoena vacated on the ground that it was impossible for the process server to identify her under the circumstances. Defendant contended that the article was innocent, and belonged to the class generally recognized as having a "news value." The Appellate Division of the Supreme Court of New York held that it was difficult to perceive what news value it could have, and impossible to discover its literary value, and that if newspapers saw fit to give their readers fiction instead of news they did so at their peril. In the opinion of the court it was libelous, as holding plaintiff up to ridicule and lowering her character in the estimation of the community.

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A number of years before the late Chief Justice Melville W. Fuller was appointed to the United States Supreme Court, he presided, at the request of a Chicago coroner, at an inquest at which one of the jurors, after the usual swearing in, arose and pompously objected against service, alleging that he was the general manager of an important concern and was wasting valuable time by sitting as a juror at an inquest.

Judge Fuller, turning to the clerk, said: "Mr. Simpson, kindly hand me 'Jervis,' the authority on juries."

After consulting the book a moment, he turned to the unwilling juror:—

"Upon reference to 'Jervis' I find, sir, that no persons are exempt from service as jurors except idiots, imbeciles and lunatics. Now under which heading do *you* claim exemption?"

Judge Gaynor related a little anecdote while lying at the hospital, after the dastardly attempt on his life, which proved that the mayor was cognizant of certain evils and not at all adverse to giving them publicity.

"I knew a man over my way," said the judge with a smile, "who had formerly been a bartender. Going into politics he was elected a police justice. With some dread he heard his first case. Mary McMannis was up before him for drunkenness. The ex-bartender looked at her for a moment, and then said, sternly:—

"Well, what are you here for?"

"If yer please, yer Honour," said Mary, "the copper beyant pulled me in, sayin' I was drunk. An' I doan't drink, yer Honour; I doan't drink."

"All right, said the justice, absent-mindedly, "all right; have a cigar."

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Many suggestions have from time to time been made for the improvement of our present system of trial by jury. A proposal has been put forth that after hearing the evidence and the judge's summing up, each juror shall, without consultation with any of his fellow jurors, write his verdict on a slip of paper. There is food for thought in this proposal. The strong-minded, pig-headed, blatant juror often affects the opinions of his fellow jurors. Moreover, many dispositions unknowingly lean to the views of a majority. The objection to the suggestion seems to us to be the risk of more trials being abortive owing to the disagreement of the jury. Such a system would, we think, involve the verdict of the majority being accepted.—*Law Notes*.

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In the admission of women as lawyers the States lead. Mrs. Judith Foster, the well-known American woman lawyer and Republican campaign orator, was admitted to the Iowa Bar as long ago as 1872. Mrs. Myra Bradwell, who was refused admission to the Bar in Illinois before the law was passed making women eligible, founded a law newspaper, and was in partnership with her husband. Their daughter is now chairman of the Legal News Publishing Company. Among the official positions held at the present time by women lawyers in America are Assistant Attorney-General of the Philippine Islands, Examiner in Chancery to the United States Supreme Court, and assistant counsel to the

Corporation of Chicago. New Zealand was the first of our colonies to admit women to practice law, and Canada followed. Miss Greta Greig was the first women barrister admitted at the law courts at Melbourne. In India, Miss Cornelia Sorabji, who holds an English law degree and the Kaiser-i-Hind Medal, furnishes legal assistance to Indian wards and widows in the management of their estates through the Bengal Court of Wards.

—*Law Notes.*

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Lord Westbury when at the Bar was an impatient man with his juniors. On one occasion a junior repeatedly urged his leader to take a certain point, which the latter persisted was contemptible. The case went badly, and at last the leader took his junior's advice. The argument produced a marked effect on the judge, and in the end judgment was given for Lord Westbury's client. After glancing at the judge, he turned round to his junior. "I do believe," he muttered coldly, "this silly old man has taken your absurd point."

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The great John Clerk used to address the Court of Session in broad Scotch, and he did not attempt to refine his accent when he pleaded in the House of Lords. One of his answers to the Lord Chancellor is very widely known to all lawyers. He was speaking in a case regarding water rights, and was making frequent references to "the watter." "Mr. Clerk," interposed the Chancellor, "do they spell water with two 't's' in your country?" "Na, my Lord, but they spell mainners with twa 'n's'."

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## MAINTENANCE AND CHAMPERTY.

In the recent case of *Colville v. Small*, 22 O.L.R. 33, Mr. Justice Middleton has determined that where a man takes an assignment of a debt subject to an agreement that he is to sue for its recovery and divide the amount recovered between himself and the assignor that is a champertous agreement and void and that the action cannot be maintained.

Such a transaction would be a champertous bargain and void at common law because at common law choses in action were not assignable; an assignment, therefore, such as was in question in *Colville v. Small* would have no legal operation whatever at common law, and, notwithstanding the assignment, the action to recover the thing assigned would have had to be brought in the name of the assignor, and if that action were brought by the assignee in the assignor's name, even with the latter's consent, he would have no legal right to maintain it, and his doing so would be "maintenance." The common law required every suitor to prosecute and maintain his own suit and regarded any third person carrying on suits in the name of others as committing an unlawful act which was called "maintenance" which was an indictable offence at common law: see *Alabaster v. Harness* (1894), 2 Q.B. 297; (1895), 1 Q.B. 639; 70 L.T. 375, and if in addition to maintaining the action he bargained for the proceeds, or any part of the proceeds of the litigation, that was called "champerty" and was also illegal and a criminal offence: *Meloche v. Deguire*, 34 S.C.R. 29.

But it was of the essence of the common law offence of maintenance, that the action maintained should be the action of some other person than that of the maintainor. No one could be guilty of "maintenance" in respect of an action brought in his own name and at his own cost. The Judicature Act now permits

the assignment of choses in action and enables the assignee to sue for their recovery in his own name, and it is clear that an assignee suing in his own name cannot be guilty of "maintenance." Under the Act a man may validly assign a chose in action in trust for himself (the assignor), and the assignee may lawfully sue for its recovery and it was so determined by the English Court of Appeal in *Fitzroy v. Cave* (1905), 2 K.B. 346; 93 L.T. 499. If a man may lawfully assign the whole chose in action in trust for himself why may he not assign part to the assignee for his own use and part in trust for himself (the assignor)? According to this decision in *Colville v. Small* this constitutes "champerty."

Champerty as the derivation of the word imports would seem originally to have applied to real actions, and the common law had to be supplemented by the statute against buying feigned titles, which has since been repealed. Formerly a mere right of entry could not be purchased so as to enable the purchaser to sue for the recovery of possession in his own name, but now it may. We have a statutory definition of "champertors" and a declaration that "champerty" is illegal, but the Act is merely declaratory of the common law, according to the Act (R.S.O. c. 327) : "Champertors be they that move pleas and suits, either by their own procurement or by others, and sue them at their own costs, for to have part of the land at variance, or part of the gains."

This statutory definition of "champertors" appears to include as an essential part of the definition, the bringing or promoting of a suit in the name of some other person; "maintenance," therefore, seems to be an essential part of the offence of "champerty," and although there may be "maintenance" without "champerty" it does not seem possible according to the statutory definition of a champertor that there can be "champerty" without "maintenance," except, perhaps, in the case of a solicitor.

In short, as was said by Davis, J. in *Meloche v. Deguire*, supra, "champerty is defined to a species of which 'mainten-

ance' is the genus. It is said to be a more odious form of maintenance but it is only a form or species of that offence. The gist of the offence both in 'maintenance' and 'champerty' is that the intermeddling is unlawful and in a suit which in no way belongs to the intermeddler."

Champerty and maintenance may still be committed, the offence has not been abolished. If a man (other than a solicitor) at his own costs brings an action in another's name, with that other's consent, or supplies, or agrees to supply, him with money to bring it on an agreement to share in the proceeds of the litigation that would be both maintenance and champerty. The bringing of a suit in the name of a person under disability by his next friend, however, is not maintenance, because that is a proceeding authorized by law and if a solicitor bring an action for his client at his own cost, that is not "maintenance": *Re Solicitors, Clark v. Lee*, 9 O.L.R. 708, but if he do so on an agreement to share the profits of the litigation that would be "champerty": *Re Solicitor* 14 O.L.R. 404, though perhaps not "maintenance," unless it be that the champertous agreement would make that "maintenance," which, without it, would not be so. And even though a client were to assign to his solicitor some aliquot part of a chose in action the subject of litigation instituted by the solicitor in his own name on his client's behalf, and at the solicitor's own costs, that would also appear to be, if not champertous, at all events, illegal, because of the peculiar relation of solicitor and client, which precludes the making of such bargains: *Re Solicitor*, 14 O.L.R. 464. A mere agreement to divide the proceeds of litigation with some other person does not of itself constitute "champerty;" there must also be a carrying on, or a furnishing or agreement to furnish funds to carry on, litigation in the name of another who alone is legally interested, on a promise of the fruits or part of the fruits of the litigation.

When the case of *Colville v. Small* was previously before the same learned judge on an interlocutory motion (see 22 O.L.R. p. 2), he referred to the language of Cozens-Hardy, L.J., in

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*Fitzroy v. Cave, supra*, where that learned judge said: "Henceforth in all courts a debt must be regarded as a piece of property capable of assignment in the same sense as a bale of goods. And on principle, I think it is not possible to deny the right of the owner of any property, capable of legal assignment to vest that property in a trustee for himself. . . . If the assignment is valid at all, it is valid in all courts, and the plaintiff is entitled to judgment ex debito justitiae," which is a distinct authority for the proposition that there is no "champerty" in a man transferring a debt to another in trust for himself (the assignor) which seems to support the view which we have expressed, and we are therefore somewhat at a loss to understand how the learned judge ultimately reached the conclusion that the assignment of the chose in action in question was "champertous."

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#### SIR WILLIAM BLACKSTONE.

The last number of *Case and Comment* has a series of articles referring to the life and work of Sir William Blackstone, setting forth the various ways in which his immortal *Commentaries* and other writings have conduced to the development and elucidation of the laws of England. As to this it has been said by Lord Campbell that he "rescued our profession from the imputations of barbarism." Sir William Jones writes:—"His *Commentaries* are the most correct and beautiful outline that ever was exhibited of any human science." Mr. Dicey thus refers to him:—"By virtue, both of his knowledge of law and of his literary genius, Blackstone produced the one treatise on the laws of England which must, for all time remain a part of English literature." Bentham says:—"He it was who, first of all institutional writers, has taught jurisprudence to speak the language of the scholar and the gentleman, put a polish upon the rugged science, and cleansed her from the dust and cobwebs of the office."

We would gladly give more space to this interesting subject, but have only room for the following, mainly compiled as we are told, from various articles appearing in the *Law Times*:

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William Blackstone, born July 10th, 1723, was the posthumous son of a London tradesman. "If Blackstone's father—the silk mercer of Cheapside—had not died before his son entered the world," says an English writer, "the author of the *Commentaries on the Laws of England* might have lived and died a prosperous tradesman—a citizen of 'credit and renown' like worthy John Gilpin, and nothing more. But Fate ordered otherwise. The silk mercer died, and young William Blackstone fell to the care of his maternal uncle, Mr. Thomas Bigg, an eminent surgeon of London, by whom at the age of seven, he was put to school at what his biographer calls 'an excellent seminary,'—to wit, the Charterhouse, the school of Addison and Steele, of Thackeray and Leech."

"So assiduous was he in his studies that at fifteen he had got to the top of the school and was fit for Oxford, whither he went shortly afterwards as an exhibitioner of Pembroke College—the same college where, a few years before, Samuel Johnson, a poor scholar, with characteristic independence of spirit, had flung away the new shoes which someone in pity of his shabbiness had put at his door. Here at Oxford Blackstone assimilated much Latin and Greek, logic and mathematics, and achieved a fellowship at All Souls. He even composed a treatise on architecture, but the 'mistress of his willing soul' was poetry.

"It was a poetical age; the stars of Swift and Pope were setting, but the stars of Thomson and Akenside, of Shenstone and Gray, were rising, and Blackstone had undeniably a very pretty gift that way. Already at school he had won a gold medal for a poem on Milton, and the fugitive pieces which he afterwards collected shew that he might have won an honourable place among the poets of the Augustan age of England. The motto he prefixed to these effusions was the line from Horace: 'Nec lusisse pudet, sed non incidere ludum,' which may be roughly rendered: 'I shame not to have had my fling; shame's his who cannot stop.' Conscious that poetry was not his life work; conscious, probably, of his own limitations in the art,—he bade farewell to his muse in some excellent lines, and girded himself up for his severer studies.

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"It was no primrose path which he had chosen for himself in this study of the law, but a steep and thorny track. There was nothing in the legal London of the eighteenth century of the well-ordered academic life to which he was used at Oxford; no system of professional training. The age of moots and readings was past and that of 'pupilizing' had not begun. This is how he sketches the novitiate of the law student of his day. 'We may appeal to the experience of every sensible lawyer whether anything can be more hazardous and discouraging than the usual entrance on the study of the law. A raw and inexperienced youth in the most dangerous season of his life is transplanted on a sudden into the midst of allurements to pleasure, without any restraint or check, but what his own prudence can suggest; with no public direction in what course to pursue his inquiries—no private assistance to remove the distresses and difficulties which will always embarrass a beginner. In this situation he is expected to sequester himself from the world, and by a tedious, lonely process to extract the theory of law from a mass of undigested learning, or else by an assiduous attendance on the courts to pick up theory and practice together sufficient to qualify him for the ordinary run of business.' We have changed all that now, thanks very much to Blackstone himself. The law student of to-day has his director of studies, his student's library, his lectures, his prizes, his moots and debating societies. Had Blackstone himself enjoyed the last advantage—practised declamation in a debating society—he might have won his way to professional distinction earlier; for as his biographer admits, he was 'not happy in a graceful delivery and a flow of elocution, and so acquired little notice and little practice.' Well was it, however, for the world that he did not, for as a busy junior he could never have laid the foundations of that wide legal learning which shines forth in the Commentaries. We, looking back, can see this, but Blackstone only saw that he had been waiting vainly on Fortune, the fickle goddess, for nearly seven years after his call (1746), and he made up his mind to woo her smiles no longer, but to retire to his fellowship at All Souls.

"A most useful member of the college he proved. As bursar he put the college muniments in order, he reformed the system of accounts, completed the Codrington Library, and by an essay on Collateral Consanguinity did much to relieve the college from troublesome claims by remote kindred of the founder. As a delegate of the University press he made himself master of the mechanical part of printing, remedied abuses, and rescued the press from the 'indolent obscurity' into which it had sunk. As visitor of Queen's College he was instrumental in building the fine façade of that college which now fronts the High Street. Wherever he went Blackstone brought with him—all his life—an active, orderly, reforming mind, and an enormous capacity for taking pains.

"At the suggestion of Murray, afterwards Lord Mansfield, Blackstone delivered a series of lectures on English law, on his own account, at Oxford, 'and the experiment proved eminently successful. The lectures are attended, we are told, by a "very crowded class of young men of the first families, characters, and hopes," and Blackstone's fame as a lawyer grew in proportion. The King paid him the compliment of asking him to read his lectures to the Prince of Wales, afterwards George III. An addition of the Great Charter and of the Charter of Forest, which he published at this time, added much to his reputation; and so when, a year or two after, a professor was to be appointed under Mr. Viner's bequest to the University, Blackstone was unanimously chosen.'

"Jeremy Bentham, however, who attended the lectures, declares that Blackstone was a 'formal, precise, and affected lecturer—just what you would expect from the character of his writings—cold, reserved, and wary, exhibiting a frigid pride.' But this estimate need not surprise us when we recall the mental attitude of Bentham, who states that to no small part of the lectures he listened 'with rebel ears.'

"For four years Blackstone was Vinerian Professor, a period signalized by the composition of those lectures which became known to fame as the *Commentaries*, and which, so it is

said, brought the fortunate author a return of no less than £14,000—probably the largest remuneration the author of a single treatise has ever been able to secure. Blackstone's practice at the Bar increasing, he resigned his Vinerian Professorship in 1762, being succeeded by Robert Chambers, afterwards Chief Justice of Bengal, but best remembered as an intimate friend of Dr. Johnson. In 1777 Chambers was succeeded by Richard Woodeson, who wrote several legal works of no great note, and in 1793 he in turn gave place to James Blackstone, a son of the first professor. A new distinction was conferred upon the post when, in 1882, Mr. A. V. Dicey was elected to fill it; for his lectures have given us his classic work on the English Constitution, and his no less interesting and valuable Law and Opinion in England.

"In 1759 on the strength of his rising fame, Blackstone had taken chambers again in the Temple, and his own reports (King's Bench), covering the whole period from his call to his death (1746-1779), shew that his services were increasingly in demand. His name constantly appears in the arguments before Lord Mansfield. In 1760 he was invited by Chief Justice Willes to take the coif. In 1763 he became Solicitor-General to the Queen and a Bencher of his Inn—the Middle Temple. But it was not until 1765 that the first volume of his famous Commentaries, based on his lectures, made its appearance.

"The Commentaries were written on the first floor (south) of 2 Brick Court, Temple, but not without interruption from a lively neighbour. Oliver Goldsmith, recently enriched to the amount of £500 by the profits of the *Good-Natured Man*, had invested the money in the purchase of chambers on the second floor of the Brick Court, exactly over Blackstone's head, and these chambers were the scene of much hilarious festivity. Sometimes it was 'a cheerful little hop,' at other times a supper party with blindman's buff, forfeits and games of cards, diversified with Irish songs, or a minuet danced by Goldsmith with an Irish lady, in which the poet testified the exuberance of his spirits by wearing his wig back to front, or tossing it gaily up to the ceiling.

'Very probably,' said Lord Chief Justice Whiteside, 'while Blackstone was deep in the mysteries of the Feudal system, his investigations were interrupted by the merry companions of Goldsmith singing lustily "The Three Jolly Pigeons." These overhead revels naturally did not assist the progress of the great work, and were the subject of frequent complaint on the part of the Doctor of Laws against the Doctor of Physic.' But we may well overlook the eccentricities and faults of Ireland's sweetest poet when we remember the splendour of his genius. We may say with Dr. Johnson, who, when he first learned that Goldsmith was dead, sadly remarked: 'Poor Goldy was wild—very wild—but he is so no more.'

'Another interesting circumstance is related by Dr. Scott. 'Blackstone,' he says, 'a sober man, composed his Commentaries with a bottle of port before him, and found his mind invigorated and supported in the fatigue of his great work by a temperate use of it.'

"With his return to practice in London, Blackstone entered Parliament as a member for Westbury. Wilkes, the notorious agitator, had just then set the country in a blaze with an obscene and impious libel, and in consequence had been expelled from the House of Commons, and Luttrell elected in his place. This election of Luttrell, known as the Middlesex election, was challenged by the Whigs as unconstitutional on the ground that Wilkes' expulsion did not create in him an incapacity of being re-elected. The Tories brought on a motion to declare Luttrell duly elected, and Blackstone, being put forward to support it, gave it as his opinion that Wilkes was by the common law disqualified from sitting in the House. Grenville, on behalf of the Whigs, retorted by reading a passage from the Commentaries (p. 162) stating the causes of disqualification, none of which applied to Wilkes. Instead of defending himself, Blackstone, according to Philo-Junius, 'sunk under the charge in an agony of confusion and despair.' 'It is well known,' says the same writer, describing the scene, 'that there was a pause of some minutes in the House, from a general expectation that the doctor would say

something in his own defence, but it seems that his faculties were too much overpowered to think of those subtleties and refinements which have since occurred to him.' Smart party journalism of this kind must not be taken too seriously. Blackstone was silent, partly because he was not naturally a ready debater, and partly because your deep thinker takes longer to adjust his ideas. But Sir Fletcher Norton—an expert debater—came to his rescue and turned the laugh against Grenville: 'I wish,' he said, 'the honourable gentleman instead of shaking his head, would shake a good argument out of it.'

"The passage in question from the Commentaries furnished, no doubt, a capital argumentum ad hominem for debating purposes, but it was not inconsistent with Blackstone's Parliamentary view. It enumerated the disqualifications for serving in Parliament, not mentioning the cast of expulsion, which, no doubt, Blackstone had not thought of before, and concluded with these words, 'But, subject to these restrictions and disqualifications, every subject of the realm is eligible of common right.' In subsequent editions of his work Blackstone added Exclusion from the House to the list, and hence arose the practice at Whig banquets of giving as a toast 'The First Edition of Blackstone's Commentaries.' Whatever the merits of the controversy, its result was to disenchant Blackstone with Parliamentary life. It taught him the lesson—to use his own words—that 'amid the rage of contending parties a man of moderation must expect to meet with no quarter from any side.' "

"Junius's Anti-Blackstonian letters," wrote Mr. N. W. Sibley, "are some five in number, some of which were written under the nom de guerre of Philo-Junius. Speaking of the learned Commentator's action in the Wilkes' controversy, the great satirist wrote: 'Doctor Blackstone is solicitor to the Queen. The doctor recollects that he had a place to preserve, though he forgot he had a reputation to lose. We have now the good fortune to understand the law, and reason the doctor's book may safely be consulted, but whoever wishes to cheat a neighbour of his estate, or to rob a country of its rights, need make no scruple

of consulting the doctor himself.' In the letter which he openly addressed to Dr. Blackstone, Solicitor-General to Her Majesty, Junius declared that the omission of a previous expulsion from the category of incapacities to sit in the House of Commons amounted to so grave a defect in the Commentaries as to render them—what Blackstone himself called unrepealed penal laws—'a snare to the unwary.' Junius concluded: 'If I were personally your enemy I should dwell with a malignant pleasure upon these great and useful qualifications, which you certainly possess, and by which you once acquired, though they could not preserve to you, the respect and esteem of your country. I should enumerate the honours you have lost, and the virtues you have disgraced; but having no private resentments to gratify, I think it sufficient to have given my opinion of your public conduct, leaving the punishment it deserves to your closet and yourself.' To employ Edmund Burke's language about Junius, he made the doctor his quarry, and made him bleed beneath the wounds of his talons. On the other hand, Blackstone's oration in the House of Commons on Wilkes' re-election, while it gave birth to a literature almost as extensive as that of the German critics on Cicero's 'Oratio pro Murena,' found able defenders, and the doctor's reply to Junius was not wanting in incisiveness. It is impossible not to recognize the force of his defence that the House had the power to pass a law on a particular person, that the privilegium of the Roman law furnished a parallel, and that acts of attainder afforded apt instances of laws passed against particular persons. But perhaps Junius won a triumph over the doctor, by his pointing out that the latter attributed to a resolution of one House the force of law, and that in 1698 an expelled member was re-elected and sat again in the House. Besides his support of the government in Wilkes' case, Blackstone incurred the censure of Junius for having been an adviser of Sir James Lowther against the Duke of Portland in the dispute concerning the Cumberland Crown lands in Inglewood Forest upon the obsolete law of *nullum tempus*. But perhaps the letter written by Junius under the nom de guerre of 'Simplex,' protesting

against the pardon granted to one Quirk, a rioter during the Wilkes' contest, contains the most elaborate satire written by Junius on Blackstone. The innuendo in the letter seems to lie in imputing to Blackstone that he never gave advice consistent with his statement of the law in the Commentaries. But, so far from denouncing his Commentaries on this occasion as 'a snare for the unwary,' Junius said: 'The respect due to his (Blackstone's) writings will probably increase with the contempt due to his character, and his works will be quoted when he himself is forgotten or despised.'

"In 1731 Parliament enacted that thereafter all proceedings in the courts should be in the English language, written in common legible hand, and in words at length. 'Such eminent personages, however, as Mr. Justice Blackstone and Lord Chief Justice Ellenborough,' says the *Daily Telegraph*, "frankly confessed that they regretted the halcyon days when Norman-French and Latin were the legal tongues. Norman-French, though fairly copious as to vocabulary, was not always equal to demands made upon it by legal gentlemen. Occasionally they found themselves compelled to eke out their Norman-French with English. An address to a grand jury is preserved, in which that body was being at once cautioned against the dangers of Popery, and reminded of the enormity of the offence of those who received stolen goods. 'Car jeo dye,' remarks the draftsman, "pur leur amendment, ils sont semblable als vipers labouring to eat out the bowells del terre, which brings them forth. De Jesuits leur positions sont damnable. La Pape a deposyer Royes ceo est le badge et token del Antichrist. Doyes etre careful to discover aux. Receivers of stolen goods are semblable a les horse-leeches which still cry, 'Bring, bring.'" This was the jargon which Cromwell abolished and King Charles II. restored to the courts, and which Mr. Justice Blackstone lamented.

"In 1770 Blackstone was raised to the bench as a judge of the Common Pleas, and continued to sit until his death, nine years later. But the great commentator on the laws of England was not destined to develop into the great judge—the rival of Mans-

field or Buller. He was lacking in initiative—too cautious in his views; too scrupulous in his adherence to formalities. The reputation he has left is that of a sound and painstaking judge, not a judge of the brilliant or architectonic order.

“He was not too busy to find time for innocent amusements. He was, says his brother-in-law, ‘notwithstanding his contracted brow (owing in a great measure to his being very near-sighted) and an appearance of sternness in his countenance, often mistaken for ill-nature, a cheerful, agreeable, and facetious companion.’ But all men have their failings, and his was a constitutional irritability of temper, increased in later years by a strong nervous affection. This may be illustrated by an anecdote related by the author of *The Biographical History of Sir William Blackstone*: ‘I was perfectly well acquainted with a certain bookseller, who told me that, upon hearing Mr. Blackstone had commenced Doctor of Civil Law, the next time he did him the honour of a visit, he (the bookseller) in the course of conversation, and out of pure respect, called the new made civilian, “Doctor.”’ This familiar manner of accosting him (as he was pleased to term it) put him in such a passion, and had such an instantaneous and violent effect, and operated upon him to so alarming a degree, that the poor bookseller thought he should have been obliged to send for a doctor. People in these days put such irritability down to temperament, and are rather proud of it. Not so Blackstone. He was—so Lord Stowell tells us—the only man he had ever known who acknowledged and bewailed his bad temper.’

“His home was at Priory Place, Wallingford—conveniently situate between London and Oxford—and here, as elsewhere, he was active in local improvements, in road making and bridge building; the bridge at Shillingford, well known to lovers of the Thames, is one which we owe to him. To his architectural talents, liberal disposition, and judicious zeal, Wallingford likewise owes the rebuilding of the handsome fabric, St. Peter’s Church. He died on February 14th, 1780, in the fifty-seventh year of his age, and was buried in a vault built for his family in this church.”

*JUDGES vs. JURIES.*

We have been favoured by Mr. John W. Hinsdale of Raleigh, N.C., United States, with a copy of his address to the North Carolina Bar Association, in which he discusses at some length two important questions:—

First. Whether jury trial of civil actions should be abolished, and if so, what is the best substitute.

Second. How can the system of trial by jury be improved.

After giving a sketch of the institution of trial by jury established, as generally believed, by Alfred the Great, the writer goes on to shew how, in times of oppression, jurors had often stood between the oppressor and the oppressed, though sometimes forced to become the weapon of the former. He concludes this part of the subject by saying, "the halo of glory which surrounds this institution by reason of the splendid conduct of juries in the state trials of past ages still dazzles us with its splendour, and unborn generations will cling to it, in criminal cases, with increasing tenacity, love, and admiration."

With regard to juries in civil actions the result is not so satisfactory. In some classes of cases, as for instance where a woman is a party, or where corporations are concerned, juries are apt to be guided in their verdict in the first case by chivalrous regard for the fair sex, and in the second by the opinion that, as between a corporation, especially a railway company, and a private person, the latter is the one to whom favour should be shewn. He refers to the courts of equity, as they formerly existed, in which so wide a jurisdiction was exercised by the judge alone, and where it so seldom happened that juries were called upon to decide questions of fact. He also quotes at length the opinion of the Hon. J. H. Choate, who puts the case this way: "If jury trial is so good, why not extend it to the numerous class of cases in which it is not taken advantage of? Why not extend it to courts of equity, of admiralty and of divorce?" If, he says, "jury trial is such an admirable

system let us extend it to the decision of all questions of fact" in all the courts. "If it is a system of doubtful utility, and a bungling and uncertain means of arriving at justice, let us then curtail it, at least in civil cases."

After quoting many authorities and adducing many facts to shew how often very little confidence could be placed in the finding of juries in civil cases, the writer goes on to point out why this is so, the reason being the incompetence of jurors generally, from want of education, experience, and general knowledge, to judge and sift testimony, and to detect falsehood, for which something more than common sense is required. "Jurors are emotional, sympathetic, frequently prejudiced, and often regard their oath as a mere matter of form. It is sometimes a task beyond their powers to apply the propositions of law laid down by the court to the facts of the case." The writer's conclusion is that all issues of fact in civil cases can be more safely, certainly, and satisfactorily determined by one or three impartial, experienced, and learned judges, than by a jury, however honest and well-intentioned.

This is the answer to the first question, and in pursuance of it the writer proposes that "all civil actions should be tried by three nisi prius judges who should rotate and thus avoid all possible local influence, prejudice or favour." But however desirable and however much desired, such a change may be, there are constitutional difficulties in the way which must be removed before it can be effected, and these the writer proceeds to consider, and to point out how, until they are removed, the system of trial by jury may be improved. Into this part of Mr. Hinsdale's address we cannot enter as it deals with conditions differing from ours, and with which we are not concerned. Enough has been said upon the general question to shew what a strong feeling exists among those engaged in the administration of justice in the United States in favour of the substitution of judges for jurors in all civil cases for the trial of questions of fact as well as of law.

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In this country, as well as in England, the trend of public opinion is in the same direction, as is proved by the increasing number of cases in which the decision of a judge in questions of fact is preferred to that of a jury and by the tendency in all matters of procedure to adopt the same principle.

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#### TRESPASS BY AEROPLANE.

The art of flight has progressed so rapidly, and cross-country flights are of such frequent occurrence, that the question of trespass by flying over a person's land merges from an abstract subject for discussion into a matter of the greatest practical importance. The following observations discuss (1) the proposition that it is an act of trespass merely to fly over a person's land, and (2) the right of a landowner forcibly to eject a trespassing aviator.

(1) To constitute trespass, which may be defined as the wrongful entry upon or the interference with the possession of the land of another person, proof of entry either actual or constructive is necessary. Constructive entry includes every interference or entry other than actual or physical entry, and it is submitted that, on the existing authorities, the flight by an aviator over the land of another without alighting is a constructive entry, and constitutes an act of trespass.

Cujus est solum ejus est usque ad cælum. He who possesses land possesses also that which is above it, but whether the owner of land can maintain an action for trespass against a man who uses the air above his land by flying in an air-machine has been doubted by Lord Ellenborough, but affirmed by Lord Blackburn. In *Pickering v. Rudd*, [1815] 4 Camp. 219, where the defendant nailed to his own wall a board so as to overhang the plaintiff's close, it was held by Lord Ellenborough that an action for trespass would not lie against a man for interfering with the column of air superincumbent on a close, but that the proper remedy for any damage arising from the board everhang-

ing the close would be by an action on the case; otherwise it would follow that an aeronaut would be liable to an action of trespass quare clausum fregit at the suit of the occupier of every field over which his balloon passed in the course of his voyage. Lord Ellenborough's dictum was questioned fifty years later in *Kenyon v. Hart*, [1865] 6 B. & S. 249, 252, wherein Blackburn, J. (as he then was), said, "I understand the good sense of that doubt, though not the legal reason of it"; and it is difficult to see how *Pickering v. Rudd* is an authority of assistance to the argument that flight over a person's land is not an act of trespass. From the judgment of Lord Ellenborough it is clear that he was of opinion that, although no action of trespass would lie, the proper remedy would have been by an action on the case. It must not be forgotten that this case was decided in the year 1815, when, as was recently observed in the Court of Appeal, the form of an action was of the utmost importance in the eyes of the court, and when there was no machinery by which an action of trespass could be turned into an action on the case. The old distinction between an act which itself occasioned a prejudice and an act a consequence from which was prejudicial, was abolished by the rules of the Supreme Court under the Judicature Acts, and the one action of trespass now covers both an action of trespass and an action on the case.

It is submitted that the occupier of land is entitled to the free user of the air above his land. Although there is no right to air under the Prescription Act, or as an easement by prescription from the time of legal memory, it has been held that a vestry or a board of works in whom is vested the management and control of the streets situate within their district are entitled to so much of the air above the streets as is compatible with the ordinary user thereof. In *Wandsworth Board of Works v. United Telephone Co.*, [1884] 13 Q.B.D. 904, the defendants suspended from chimneys telephone wires across a street. An injunction restraining the defendants was granted by Stephen, J., which was dissolved by the Court of Appeal, the ratio decidendi being, not that the air above the surface of the street was

not vested in the plaintiffs, but that although the plaintiffs were entitled to so much of the area which was above the surface as was the area of the ordinary user of the street as a street, the suspension of wires from chimneys did not interfere with the ordinary user of the street in question. It is clear from the judgment of Brett, M.R., that he did not question the law as stated by Lord Coke, and that not only the owner of land under a grant is entitled to the free user of the air above the land, but that the word "street" in an Act of Parliament includes the air necessary for the ordinary user of the street.

Moreover, it is common enough to commit trespass by wrongful entry below the ground as by mining, and there seems no reason why wrongful entry above the surface should not similarly constitute an act of trespass. The improbability of actual damage is irrelevant to the pure legal theory, neither is it necessary that there should be force nor unlawful intention; there seems every reason to support the proposition that the mere flight over a person's land is an act of trespass, and that an action would lie against the offending aviator.

(2) The owner of land upon which a trespass is committed is entitled to remove the trespasser, and may use in so doing that degree of force which is necessary to eject the wrongdoer. The right to eject being a remedy whereby the owner of property may assert his rights, the following question may shortly come before the court to be decided.

Acts of trespass to land have been committed by A. flying repeatedly at a level within the height of ordinary buildings over B.'s land. B., instead of bringing an action for damages, or for a declaration that A. is a trespasser, or to restrain him from further acts of trespass, determines to terminate at once the annoyance by exercising his right of ejectment.

It is not easy to see how the owner could enforce his right, except by shooting at the aeroplane with the object either of frightening the aviator away, or of "winging" his machine and compelling the aviator to descend; and the question at once arises,

would the owner be committing an illegal act, and what would be his liability if the aviator were (a), injured; (b), killed.

(a) It is clear that if B. shot at A.'s aeroplane without warning and without taking any precautions he would be committing a criminal offence. It may, however, be argued that a prudent course would absolve the owner from any criminal liability arising from the consequences of his act. It may be said that the owner should, in the first place, fire a blank cartridge as an invitation to A. either to fly away or descend, just as a gunboat warns a foreign trawler fishing in prohibited waters by firing a blank shot across the bows of the offending craft. If a blank cartridge had no effect, B. should, before actually shooting at the aeroplane, fire ball cartridge past the aeroplane, so that the whistling of the bullet through the air might indicate to A. that B. was seriously determined to compel him to descend. Having taken the above preliminary steps, in addition to the precaution of engaging a skilled marksman and mechanician to shoot at the offending aeroplane, it may be argued that to fire at A.'s aeroplane would be neither an act of unnecessary violence, nor for that matter a criminal act at all.

The answer to this argument is that it is a felony punishable with penal servitude for life, unlawfully and maliciously to shoot (or even attempt to shoot) at a person with intent to maim, disfigure, disable, or do any other grievous bodily harm. Although there may be no intent to maim or disfigure, the object of the shooting is to disable the aeroplane, and there is sufficient mens rea, therefore, to constitute the above felony. It is a misdemeanour, also, punishable with five years' penal servitude, unlawfully and maliciously to wound any person, or inflict any grievous bodily harm upon him: and in *R. v. Ward*, L.R. 1 C.C.R. 356, it was held that a man who fired a gun at a boat with the object of frightening away the occupant, and who wounded him owing to the boat being suddenly slewed round, was rightly convicted of malicious wounding. It does not appear from the report of the case that the prisoner was the owner of the water upon which the boat was, nor that he was enforcing a

legal right, but it is not likely that the courts would draw so fine a distinction between this case and that of an owner protecting his property, and therefore the act of shooting at a trespassing aviator, or even merely of pointing a gun which the owner knew to be loaded, would be the commission of a criminal offence, and of an act of unnecessary violence.

(b) If the result of the shooting were fatal, the owner would be guilty of manslaughter, even if it is assumed in his favour that no offence under 24 & 25 Vict. c. 100, has been committed.

It is a principle familiar to all that every criminal offence involves the mental condition of a "vicious will" or "intention," and that there must be some form of mens rea, i.e., the wrong-doer must (1) be able to "help doing" what he does, (2), know that he is doing a criminal act, and (3), every sane adult is presumed to foresee and to intend the natural consequence of his conduct. Assuming that the owner has the right to eject trespassers, and that he has used the only force which can under the circumstances be used by him, it would be idle for the owner to argue that he did not know that a fatal accident might result, or that it is impossible to foresee such a contingency arising, or that, taking everything into consideration, such as the care with which he had fired at the aeroplane, and that he had warned the aviator of his intention to shoot, he had not in law intended the natural consequences of his act.

But the opinion has been expressed by Denman, J., in *R. v. Prince*, L.R. 2 C.C.R. 154, that criminal liability may exist even where there is an intention to do some act which is wrong, even although it does not amount to a crime; whilst Bramwell, B., giving judgment in the same case, actually went so far as to say that the intention to commit an act only morally wrong was sufficient mens rea.

However much this latter view may be questioned, it is clear that criminal liability exists where there is an intention to commit a crime, even although it is not the particular crime in fact committed, or where there is an intention to do a tortious or wrongful act which yet falls short of a crime. To shoot with

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fatal result at a trespassing aviator, without warning and without taking precaution, would be manslaughter (assuming always that 24 & 25 Vict. c. 100, does not apply), because the owner intended to commit and did in fact commit an act which was wrong. Neither would the taking of precautions, as suggested above, absolve the owner from liability since every sane adult is presumed to intend the natural consequences of his conduct, and is assumed by law to have the power of foreseeing these consequences. From whatever point the question is approached, it seems clear that the owner would not be able to enforce his right of ejection, but would be obliged to rest content with his right of action for damages or for a declaration, or for an injunction to restrain further acts of trespass.

In view of the present stage of development arrived at by the science of aviation, the writer ventures to suggest that the landowner has at his command all the remedies he requires, and to express the hope that no landlord will be tempted, should he read this article, to institute proceedings for trespass against an aviator merely for flying over the owner's land.—*Law Magazine.*

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**VERBUM SAP.**—On the door of the old Court-room of the Court of Appeal at Osgoode Hall is affixed the notice: “Dangerous, keep out.”

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**NE SUTOR ULTRA CREPIDAM:**—Motion before Court of Appeal for stated case by way of appeal from the conviction of a cobbler, aged 73, for non-support of his second wife aged 63. Mr. Justice Magee: “She was probably his last, and he did not stick to her.”

**REVIEW OF CURRENT ENGLISH CASES.**

(Registered in accordance with the Copyright Act.)

**ADMIRALTY—BILL OF LADING—INCORPORATION INTO BILL OF LADING OF CONDITIONS OF CHARTER-PARTY—ARBITRATION CLAUSE—STAYING ACTION.**

*The Portsmouth* (1910) P. 293. In this case goods were shipped under a bill of lading which provided for payment of freight "and other conditions as per charter-party." The charter-party provided inter alia for the payment of demurrage, and also contained an arbitration clause in the event of any dispute. The shipowners commenced an action for demurrage against the holder for value of the bill of lading, and an application was then made by the defendant to stay the action, on the ground that the matter in dispute must be referred to arbitration. The County Court judge granted the application and the Divisional Court (Evans, P.P.D., and Deane, J.) affirmed his decision holding that the terms of the charter-party were by reference incorporated into the bill of lading.

**EMPLOYERS' LIABILITY—NOTICE OF ACCIDENT—REASONABLE DOUBT AS TO CAUSE OF DEATH—PREJUDICE TO EMPLOYER—WORKMEN'S COMPENSATION ACT, 1906 (6 Edw. VII. c. 58), s. 1, SUB-S. 1, s. 2 (1a), s. 8—(R.S.O. c. 160, s. 13 (5)).**

*Eke v. Hart-Dyke* (1910) 2 K.B. 677 was an action under the Employers' Liability Act, 1906, which contains similar provisions to those in R.S.O. c. 160, s. 13, as to giving of notice. The deceased workman had died in October and no notice of the accident was given until December. The excuse for not giving the notice was the uncertainty of the real cause of the deceased workman's death, and this was held to be a "reasonable cause" for not giving the notice within the statutory period.

**COMPANY—WINDING-UP—OFFICIAL RECEIVER AND LIQUIDATOR—FRAUD—EXAMINATION OF PERSON CHARGED—LIQUIDATOR UNSUCCESSFULLY OPPOSING APPLICATION FOR EXCULPATION—JURISDICTION TO ORDER LIQUIDATOR TO PAY COSTS PERSONALLY.**

*In re Tweddle & Co.* (1910) 2 K.B. 697. This is the decision of the Court of Appeal (Cozens-Hardy, M.R., and Farwell and

Kennedy, L.J.J.), varying the judgment of the Divisional Court (1910) 2 K.B. 67 (noted ante, p. 537). As was remarked in that note, while agreeing with the Divisional Court that in respect of the liquidator's report and the consequent examination of the parties charged therein with fraud, the liquidator was merely discharging his official duty and as to those proceedings there was no jurisdiction to order him to pay costs personally, yet the Court of Appeal considered his unsuccessful opposition to the motion of the party charged for an exculpatory order stood on a different footing, and having made himself an active party to litigation he incurred a personal liability to pay costs if he failed, and the order of the Divisional Court was varied by directing him to pay those costs.

**JUSTICES—PRACTICE—HEARING OF INFORMATION—ABSENCE OF INFORMANT—EXAMINATION OF WITNESSES BY POLICE OFFICER.**

In *May v. Beeley* (1910) 2 K.B. 722 an information was preferred by Beeley, superintendent of police, against the appellant May, charging him with driving a motor at an excessive speed on the highway. On the hearing the informant was not present nor represented by counsel or solicitor, but witnesses were produced and examined in support of the information by a police sergeant who was also one of the witnesses in the case. The appellant's solicitor called the attention of the justices to the fact of the sergeant taking the conduct of the case, and they offered to adjourn, but the solicitor for the appellant declined an adjournment and the appellant was convicted, no objection being made to the hearing of the information in the informant's absence. On appeal from the conviction the Divisional Court (Lord Alverstone, C.J., and Bucknill, and Bray, J.J.) held that though there was some conflict as to what actually took place before the justices in regard to the offer to adjourn, the court was bound to accept the statement of the justices, and the appellant having waived the adjournment offered could not now contend that the mere fact that the police officer had improperly acted as advocate in the absence of the informant, invalidated the conviction.

## Correspondence

### GORDON v. HORNE AND THE PRIVY COUNCIL.

To the Editor, CANADA LAW JOURNAL:

DEAR SIR,—I have read with interest Mr. Deacon's letter in your last issue as well as your editorial comments upon the case of *Gordon v. Horne*. May I be permitted to add my item to the discussion. I have read the evidence set out in the judgment of Clements, J., in 13 B.C. 140-141. It seems to me incomprehensible how any court composed of reasonable men could have come to any other conclusion than what was arrived at by the Supreme Court of British Columbia, and by the Judicial Committee of the Privy Council. It was not a question of conflict of evidence but one as to the evidence of the defendant himself. I cannot see how the Privy Council, the court of last resort, could have come to any other conclusion.

Yours, etc.,

K. C.

Toronto, Nov. 22.

### ADMIRALTY LAW AND COMMON LAW.

To the Editor, CANADA LAW JOURNAL, TORONTO:

DEAR SIR,—In your issue of November 1st, at page 654, you cite *The Drumlanrig* (1910), p. 249, to shew "the difference between admiralty law and common law on the question of liability for negligence." May I suggest with all deference that your comments on this case do not define this difference in accordance with the cases? You contrast the common law rule of *Thoroughgood v. Bryan* with the admiralty rule adopted in *The Drumlanrig*, and point that while the common law rule prevents a passenger injured in one of two colliding vehicles, equally in fault, from recovering damages from the driver or owner of the other vehicle, the cargo owner, on the other hand, under similar circumstances can recover half his damage from the owner of the other boat. You suggest that the cargo owner has a better remedy than the passenger. Is it not so that *Thoroughgood v. Bryan* was decisively overruled by the House of Lords in *The Bernina*, 13 A.C. 1, and that the doctrine that the passenger is always identified with his vehicle was emphatically condemned? And was not the main point in the *Drumlanrig*

case that the cargo owner could recover only half of his damages from the owner of the other boat? Is it not the fact that the difference between the admiralty and common law rules is, in this light, rather the reverse of what you suggest?

Then, too, when you say that it seems to follow that this (*The Drumlanrig*) case would govern the practice in Canadian Admiralty Courts, because the Colonial Courts of Admiralty Act (Imp.) permits our Court of Admiralty to exercise its jurisdiction "in like manner" as the High Court in England, do you not overlook section 918 of the Canada Shipping Act (R.S.C. 1906, c. 113), which gives us express legislation on the point?

I hope you will not think me too critical, and that you will believe me as thankful as your many other readers for the uniform accuracy and interest of the JOURNAL's articles and reviews.

Faithfully yours,

Kingston, Ont.

FRANCIS KING.

[Notwithstanding what is said by the House of Lords in *The Bernina*, 13 A.C. 1, regarding their Lordships' disapproval of the principle on which *Thoroughgood v. Bryan* was decided, it is an arguable point whether that case is not still an authority at common law. (See per Williams, L.J., p. 262, per Moulton, L.J., p. 265.) The reporters say it was overruled, but it must be remembered that the point actually decided by the House of Lords was merely that the rule laid down in that case did not apply in Admiralty. The English Court of Admiralty is, as Mr. King is aware, a Division of the High Court of Justice, and that being the case, R.S.C., c. 113, s. 918, to which he refers, merely shews, as was stated in the note, that *The Drumlanrig*, is an authority in our Courts of Admiralty. As the law stands, we think, with all due respect to Mr. King, that the comment to which he objects, though perhaps not free from question, can hardly be said to be manifestly incorrect. We are rather inclined to think it would require a decision of the House of Lords expressly on the point involved in the case of *Thoroughgood v. Bryan* before that case could be considered by any inferior Court to be overruled. See *Parent v. The King*, ante, p. 694.

—EDITOR, C.L.J.]

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REPORTS AND NOTES OF CASES.

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**Dominion of Canada.**

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**SUPREME COURT.**

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**Exch. Court.]** [November 2.

**THE KING v. ST. CATHARINES HYDRAULIC CO.**

*Lease—Covenant for renewal—Construction.*

A lease for twenty-one years, made in 1851, of mill-races and lands on the old Welland Canal contained the following covenant: "After the end of 21 years, as aforesaid, if the said (lessors) shall or do not continue the lease of the said water and works to the said parties of the second part or their assigns," they would pay for improvements. After the expiration of the lease, in 1872, the lessees remained in possession and in 1880 they asked for a new lease "with trifling alterations," but were informed that their application could not be considered until the nature of the alterations was submitted. Nothing further was done, and on the expiration of a second term of 21 years the lessors resumed possession of the premises. The lessees filed a petition of right claiming compensation for improvements.

*Held*, that, the lessees were entitled to a renewal of the original term but not to a renewed lease containing the above covenant; that they were entitled to renewal or compensation; that their occupancy during the second period constituted a renewal, having obtained which their right to compensation was gone. Appeal allowed with costs.

*Dewart, K.C.*, for appellant. *Mowat, K.C.*, for respondent. *Collier, K.C.*, for sub-lessees.

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**Man.]** [November 2.

**DOMINION FISH CO. v. ISBESTER.**

*Negligence—Ship on fire—Injury to passenger.*

A ship lying at her dock caught fire during the night and was destroyed. The officers of the ship failed to arouse passengers asleep in the cabins in time to permit them to escape in safety and, in an action to recover damages for injuries sustained in consequence by one of the passengers the owners adduced no evidence to explain the origin of the fire.

*Held*, that, in the circumstances, the only inference to be drawn was that the owners were grossly negligent.

In such an action the owner of the ship cannot invoke the limitation provided by section 921 of the Canada Shipping Act, R.S.C. 1906, c. 113. Appeal dismissed with costs.

*Affleck*, for appellants. *Blackwood*, for respondent.

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Que.]

[November 2.

**OUTREMONT v. JOYCE.**

*Appeal—Jurisdiction—Matter in controversy—Instalment of municipal tax.*

In an action instituted in the province of Quebec to recover the sum of \$1,133.53 claimed as an instalment of an amount exceeding \$2,000 imposed on the defendant's lands for special taxes, the Supreme Court of Canada has no jurisdiction to entertain an appeal although the judgment complained of may be conclusive in regard to further claims arising under the same by-law which would exceed the amount mentioned in the statute limiting the jurisdiction of the Court. *Dominion Salvage and Wrecking Co. v. Brown*, 20 Can. S.C.R. 203, followed. Appeal quashed with costs.

*Beaubien and Lamarche*, for appellant. *Davidson and Ritchie*, for respondent.

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**Province of Ontario.**

**COURT OF APPEAL.**

Full Court.]

[October 13.

**BARNETT v. GRAND TRUNK RY. CO.**

*Railway—Collision—Negligence—Injury to licensee or trespasser on another railway.*

Appeal by defendants from the judgment of a Divisional Court, 20 O.L.R. 390, which set aside the judgment entered for the defendants by MEREDITH, C.J.C.P., upon the findings of a jury.

The plaintiff was on a car of the Pere Marquette Ry. Co. when the accident happened. He was not a paying passenger, but getting a gratuitous ride. The injury was caused by a car

of the defendant's colliding with the one on which the plaintiff was. The accident was caused by negligence of the defendants. The Divisional Court held that the plaintiff was a licensee and entitled to recover damages against the defendants.

*Held*, that the judgment of the Divisional Court should be sustained, for even if the plaintiff were a trespasser the defendants were liable. He was not at the time a trespasser upon the rights of the defendants. The accident was caused by their gross negligence and it was no objection to the plaintiff's claim to say that if the Pere Marquette Company or their employees had known of his presence, they would have objected and perhaps removed him. This would not relieve the defendants of their responsibility for the injury. It did not appear that as between the defendants and the Pere Marquette Company there was an obligation upon the latter not to permit any but their own employees to be upon their train. They might (as the evidence shews their trainmen were in the habit of doing) allow others beside their own employees to be upon the same train under similar circumstances. There was nothing to absolve the defendants from the duty of exercising due care to avoid collision with the Pere Marquette train.

MEREDITH, J.A., dissented on the ground that the plaintiff was a mere trespasser and that the defendants owed him no duty.

Appeal dismissed with costs.

D. L. McCarthy, K.C., for defendants. Faulds, and Bartlett, for plaintiff.

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Full Court.]

[October 22.

TREASURER OF ONTARIO v. PATTIN.

*Succession duty—Deceased resident of Ontario, but owning mortgages on lands in foreign country—Specialties—Domicile—Situs of debt.*

Appeal by administrator of a deceased from the judgment of the judge of the Surrogate Court of Essex, who held that certain mortgages belonging to the deceased on lands in the United States and made by mortgagees residing there, were liable to duty. The deceased died at Windsor on February 18, 1907, having resided there for about seven years. By the law of the state where the lands were these mortgages were instruments under seal creating debts by specialty, sufficient to create

them that according to the law of this province at the time of the death of the deceased. The mortgages were in his custody at Windsor.

*Held*, GARROW, J.A., dissenting, that these mortgages could not be said to be instruments creating merely simple contract debts. They were bona notabilia and as such were comprised of the list of properties held by the personal representative upon his application for letters of administration. The estate was therefore liable to succession duty in respect of the amount of these mortgages.

*F. D. Davis*, and *Cartwright*, K.C., for appellant. *Hanna*, K.C., and *McLeod*, for treasurer of Ontario.

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## Province of Nova Scotia.

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### SUPREME COURT.

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Russell, J.—Trial.]

[November 8.

O'BRIEN v. CROWE.

*Contract to saw lumber—Failure to complete—Defective work—Termination of contract—Damages.*

Defendant contracted for an agreed price "barring accidents" to saw for plaintiff a certain number of feet of lumber per day from logs which plaintiff was to deliver at defendant's mill. The logs were sawn in such a way as to render a percentage of the lumber produced unmerchantable and to considerably reduce the market value of a large portion of the balance. The defence was raised that the logs were delivered at the mill in a muddy condition and in some cases were covered with frozen mud to such an extent as to cause the saws to work irregularly so that the lumber could not be sawn to a uniform thickness.

*Held*, 1. This was one of the accidents with which the defendant had to reckon when he undertook to do the work and that it was no excuse for his failure to carry out his contract.

2. The plaintiff was justified in terminating the contract and in making other arrangements for the sawing of his logs and that he was entitled to recover damages both for the non-completion of the contract and for the defective manner in which part of the work was done, the damages in the later case being the reduced price which the lumber brought in the market.

*B. T. Graham*, for plaintiff. *J. P. Bill*, for defendant.

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Longley, J.]

[November 8.

GIRROIR v. McFARLAND.

*Title to land—Question of, will not be tried on affidavit on summary application—Ejectment—Parties—Effect of judgment.*

Plaintiff recovered a judgment in ejectment against defendants in respect to a lot of land claimed by him of which they were alleged to be in possession and an order for a writ of possession was granted in pursuance of which the applicant in the present proceeding was removed and plaintiff was placed in possession. The applicant moved for an order to restore her to possession on the ground that subject to a deed made to plaintiff by way of mortgage she was sole owner of the land by purchase and in sole possession at the time of the granting of the order for the writ of possession and recovery of the judgment in ejectment and that she was not a party to the proceedings in which the judgment was recovered.

*Held*, dismissing the motion with costs that the question of title—the question of the validity of the deed or to vary its character—could not in the face of the judgment already given and executed be tried on summary motion and on affidavit.

W. Chisholm, in support of the application. Gregory, K.C., contra.

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Meagher, J.—Trial.]

[November 10.

FULLER v. HOLLAND.

*Bills and Notes—Consideration—Sale of goods—Part delivery—Loss by fire—Question of title.*

Plaintiffs ordered from Belgium a number of packages of goods including 45 packages for defendant all of which arrived at Halifax consigned to plaintiffs and without any mark distinguishing those ordered for the defendant from the others. The terms of payment agreed on were 30 days after the arrival of the goods which was understood to mean 30 days after delivery of the invoice. Defendant was notified of the arrival of the goods and failing to take delivery they were removed to plaintiffs' warehouse. Defendant asked for and received delivery of a part of the goods and the balance was held to his order. Defendant was unable to pay for the goods at 30 days as agreed and offered his note at 60 days, which plaintiffs accepted, defendant paying the interest on the additional thirty days.

After the giving and acceptance of the note and the delivery of the part of the goods above referred to the warehouse with the balance of the goods was destroyed by fire.

*Held*, 1. The extension of time asked for and given to defendant involved a change of position on the part of plaintiffs constituting consideration for the note.

2. There was an implied promise on the part of plaintiffs to deliver the balance of the goods and to pay damages in the event of their failure to do so.

*Semblé*, that in order to support the defence of failure of consideration defendant must prove a demand and refusal. And if the title passed and plaintiffs were merely holding the goods as agents or bailees of defendant they were at defendant's risk and there was no failure of consideration.

*Mellish*, K.C., for plaintiffs. *W. B. A. Ritchie*, K.C., for defendant.

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Drysdale, J.—Trial.] [November 10.

**FENERTY v. CITY OF HALIFAX.**

*Water and water courses—Public supply—Storage system—Private owners—Reservation of rights for milling purposes—Limitation of.*

By a deed made in 1846, between plaintiffs' predecessors in title and the city of H., the city was given the right in connection with its water supply system to bring the waters of Long Lake into the Chain Lakes for storage purposes and the right of plaintiff's predecessors to receive water for their mills was expressly limited to the quantity of water naturally flowing theretofore from the Chain Lakes.

*Held*, that plaintiffs' rights must be based upon the natural flow of water from the Chain Lakes as it existed prior to the date of the deed, and that they were concluded by the terms of the deed from asserting the right to a greater flow by reason of the fact that the city had constructed extensive storage dams and had made one large water-shed and had increased the flow by bringing into the Chain Lakes other streams.

*Fenerty*, for plaintiffs. *Bell*, K.C., for defendant.

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Longley, J.] [November 19.

**THE KING v. MCKAY.**

*Intoxicating liquors—Certiorari—Second application.*

Application was made to a judge of the Supreme Court to remove a conviction for a violation of the Liquor License

Act and was refused on the ground that the affidavits of justification of bail were not sufficient. The affidavits were amended and the application was renewed on substantially the same grounds (non-service of the writ of summons) before the presiding judge, at Sydney.

*Held*, following *R. v. Pickles*, 12 L.J.Q.B. 40, that the application must be dismissed, a previous application having been made on the same grounds to another judge and refused.

*D. A. Cameron*, for prosecutor. *Gunn*, for defendant, applicant.

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## Province of Manitoba.

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### KING'S BENCH.

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*Mathers, C.J.]* [September 14.

*WEST WINNIPEG DEVELOPMENT Co. v. SMITH.*

*Practice—Costs—Landlords and Tenants Act—Summary proceedings for ejection.*

The costs of a summary proceeding under the Landlords and Tenants Act, R.S.M. 1902, c. 93, to eject a tenant are the costs of an action in the King's Bench and taxable on the same scale.

*Maclean*, for landlord. *Blackwood*, for tenant.

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*Prendergast, J.]* [September 14.

*MILLER v. SUTTON.*

*Vendor and purchaser—Cancellation of agreement of sale for default in payment—Recovery by purchaser of money paid on account—Counterclaim.*

In an action by the vendor of land against the purchaser for specific performance of the agreement to purchase or in the alternative for cancellation of the agreement for default in subsequent payments, if the purchaser has acquiesced in the cancellation after notice thereof served on him by the vendor, he cannot recover back by counterclaim the money which he had originally paid on account of the purchase.

*Hoskin, K.C.*, for plaintiff. *Galt, K.C.*, for defendant.

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**Robson, J.]****[September 21.****HIME v. COULTHARD.****Attachment—Tort—Action for enticing away plaintiff's wife and crim. con.**

An attaching order against the defendant's property cannot properly be made under rules 813-858 of the King's Bench Act, R.S.M. 1902, c. 40, upon the commencement of an action for damages for enticing away the plaintiff's wife and for criminal conversation, because,

*Held*, 1. There is not "a cause of action arising from a legal liability" within the meaning of that expression in rule 815, as the cause of action and the legal liability arose simultaneously from the tortious act. Legal liability giving rise to a subsequent cause of action is found only in contract.

2. The plaintiff could not properly make the affidavit required by rule 817, viz., that the defendant is legally liable to him in damages in the sum claimed in the action. *Emperor of Russia v. Proskouriakoff*, 18 M.R., at page 73 and *McIntyre v. Gibson*, 17 M.R. 423, followed.

3. The words in rule 817 "after making all proper and just set-offs, allowances and discounts" are not applicable in regard to torts.

*Mackay*, for plaintiff. *Affleck*, for defendant.

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**Robson, J.]****[October 1.****STANGER v. MONDOR.****Registry Act—Real Property Act—Effect of filing deed after application for certificate of title under Real Property Act—Priority as between such deed and an unregistered prior conveyance.**

The filing of a deed with an application for a certificate of title under the Real Property Act, R.S.M. 1902, c. 148, as one of the evidences in support of the title, does not constitute a registration of the deed under the Registry Act, R.S.M. c. 150, so as to give it priority over a prior unregistered conveyance, although the practice in the land titles office is to make certain entries in the abstract book kept under the old system and to give the deed a number. *Farmers & Traders Loan Co. v. Conklin*, 1 M.R., at pp. 188, 189, and *Renwick v. Berryman*, 3 M.R., at p. 400, followed.

*Heap*, for caveator. *Blackwood*, for caveatee.

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Robson, J.] [October 1.  
SMITH v. CANADA CYCLE AND MOTOR Co.

*Pleading—Denials of allegations of fact in the statement of claim—King's Bench Act, rule 290, as re-enacted by 7 and 8 Edw. VII. c. 11, s. 4.*

To an action charging negligence on the part of the defendants in leaving open and unguarded a trap-door in their premises through which the plaintiff, while lawfully there, fell and was injured, it is proper for defendants to plead, under rule 290 of King's Bench Act, as re-enacted by 7 and 8 Edw. VII. c. 11, s. 4., denying in separate paragraphs the leaving of the trap-door open or unguarded, and that it was by reason of its being open or unguarded that the plaintiff fell into it, if (which was not admitted) he did in fact fall into it, and setting up in other paragraphs that, if the trap-door was open (which was denied) it was sufficiently guarded by a rail and was not dangerous, that there was no negligence on the part of the defendants and that the plaintiff did not exercise ordinary care or caution in the matter.

Form of defence in Bullen and Leake, 6th ed., at p. 889, referred to.

*Chandler, for plaintiff. St. John, for defendants.*

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Robson, J.] [October 3.  
NATIONAL TRUST CO. v. PROULX.

*Devolution of estates—Death of administrator—Unadministered estate of intestate—Appointment of administrator of estate of deceased administrator—Costs.*

L., the owner of the land in question, died intestate. His widow was appointed administratrix of his estate. She died without dealing in any way with the land and the plaintiffs were appointed administrators of her estate.

*Held*, that the plaintiffs had no title to the land, and that a grant of letters of administration of the unadministered estate of L. would be necessary, followed by a conveyance from the new administrator to the plaintiffs, before they could get title. The defendant was only allowed the costs of a demurrer, as the point of law was apparent on the pleadings and he should have raised it by demurrer instead of going to trial in the ordinary way.

*Blackwood and Beaupre, for plaintiffs. Towers, for defendant.*

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Prendergast, J.]

[October 11.

COPPEZ v. LEAR.

*"Wages," meaning of word—Act respecting assignments of wages or salaries to be earned in the future, 9 Edw. VII. c. 2—Earnings of man employed to work with his own team at a rate per day, whether wages or not.*

Wages are the personal earnings of labourers and artisans and it is an essential ingredient in wages that the personal services of the labourer or artisan must not only be rendered, but must have been contemplated as such in the contract. Where, therefore, the defendant owning two teams of horses was employed to haul gravel at a rate per team per day, and hired another man to drive one of the teams for him, the earnings of the defendant for the work were held not to be wages within the meaning of 9 Edw. VII. c. 2., and an assignment by the defendant to the claimant of such earnings, although part had not yet been earned, did not come within the said Act and was held to be valid as against a garnishing order subsequently served by the plaintiff.

*Ingram v. Barnes*, 26 L.J.Q.B. 319, and Stroud's Judicial Dictionary, vol. 3, p. 2206, followed.

*Blackwood*, for plaintiff. *Hanneson*, for claimant.

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Mathers, C. J.]

[October 18.

WELLS v. KNOTT.

*Practice—Summary judgment—Counterclaim—Stay of execution pending trial of counterclaim.*

Although the plaintiff has obtained leave to sign judgment for rent due, a stay of execution should be granted until after the trial of the defendant's counterclaim for damages to the goods on the premises alleged to have been caused by non-repair, if the counterclaim is so far plausible that it is not unreasonably possible for it to succeed if brought to trial, unless some reason is shewn to believe that the plaintiff will be put in peril of losing the amount of his judgment by the delay. *Sheppards v. Wilkinson*, 6 T.L.R. 13, followed.

*Burbidge*, for plaintiff. *Coyne*, for defendant.

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Robson, J.]

[October 20.

SHEA v. GEORGE LINDSAY CO.

*Guarantee—Indemnity—Oral promise to answer for the debt of another—Statute of Frauds.*

The plaintiff had supplied goods to the defendants, the Lindsay Co., in which the defendant Finn held most of the stock, and was pressing for payment, when Finn verbally promised to pay the debt or see it paid, if plaintiff would extend the time for payment and continue to supply goods to the company and that he would "go good" for such past and future indebtedness.

*Held*, that this promise was not a contract of indemnity or novation, but was a "promise to answer for the debt of another" within s. 4 of the Statute of Frauds, and that, as it was not in writing, an action for the breach of it could not be maintained.

*Beattie v. Dinnick*, 27 O.R. 285, and *Harburg & Co. v. Martin* (1902), 1 K.B. 778, followed.

*A. V. Hudson and Ross*, for plaintiff. *L. Elliott*, and *Stackpoole*, for defendant Finn.

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Robson, J.]

[October 20.

ALLIS-CHALMERS v. WALKER.

*Warranty—Description of goods—Sales of goods—Contract for work and materials.*

The plaintiffs submitted a written proposal to supply and erect in operating order, in the basement of defendant's theatre on foundations supplied by him, an engine, generator and switchboard for a sum mentioned. The proposal embodied specifications for the engine, describing an "Ideal" engine in language evidently that of the manufacturers as follows: "The Ideal engine is particularly adapted to direct connected work on account of its perfect balance, quiet running, etc." The defendant, who had previously selected the kind of engine he wanted from a number of different kinds mentioned in the preliminary discussions, accepted the proposal. The plaintiffs performed the contract, but the engines could not be made to run quietly enough to satisfy the defendant as the noise was heard in the auditorium above.

*Held*, that the bargain was not a sale of goods, but a contract for work and materials and that there was no war-

ranty that the engine would be "quiet running" but only a recommendation of the type of engine chosen for the work required. The clause was general in its terms and had not in view any particular use of the engine.

*Chalmers v. Harding*, 17 L.T. 571, followed.

*Hull and Sparling*, for plaintiffs. *H. A. Burbidge* and *F. M. Burbidge*, for defendant.

Metcalfe, J.]

[October 26.

*HEWITT v. HUDSON'S BAY CO.*

*Workmen's Compensation for Injuries Act*—"Workman," meaning of—*Sales clerk not a workman*—*Trial by jury*—*King's Bench Act*.

A sales clerk in a shop is not a workman within the meaning of that term, as used in the Workman's Compensation for Injuries Act, R.S.M. 1902, c. 178, so that an action by a sales clerk against his employee for damages for injury alleged to have been sustained through the employee's negligence, is not one which, under section 59 of the King's Bench Act, R.S.M. 1902, c. 40, must be tried by a jury.

To entitle a workman to the benefit of the Act, the labour performed must be manual.

*Bound v. Lawrence* (1892), 1 Q.B. 226, followed.

*Deacon*, for plaintiff. *Rothwell*, for defendants.

Mathers, C. J.]

[November 2.

*PARKS v. CANADIAN NORTHERN RY. CO.*

*Railway company*—*Liability for animals killed on track*—*Railway Act*, R.S.C. 1906, c. 37, s. 294, sub-ss. 4 and 5—*Fences*—*Construction of statutes*—*Negligence or wilful act or omission of owner of animals getting at large*.

The liability of a railway company, under sub-sections 4 and 5 of section 294 of the Railway Act, R.S.C. 1906, c. 37, for damages in the case of animals at large killed or injured by a train, is not limited to territory where the company is by section 254 obliged to erect suitable fences, and the company can only escape such liability by shewing that the animal got at large through the negligence or wilful act or omission of the owner or his agent or the custodian of such animal or his agent.

The Railway Act of 1903 changed the law in this respect. *Bank of England v. Vagliano* (1891), A.C., per Lord Herschell at p. 144, followed as to the interpretation of a statute altering the former law.

*Arthur v. Central Ontario Ry. Co.*, 11 O.L.R. 537; *Bason v. Grand Trunk R. Co.*, 12 O.L.R. 196, and *Becker v. C.P.R. Co.*, 7 Can. Ry. Cas. 29, followed.

The plaintiff had for two years been accustomed to turn his horses out of the stable in the winter to go without halters, to a watering trough about fifteen yards away and driving them back to the stable after drinking. On the occasion in question the plaintiff and his hired man were carrying out the usual routine when three of the horses after drinking, without their noticing it, walked off in the direction of the road instead of returning to the stable. When the fourth had finished drinking it started to walk after the others. The plaintiff observed this and immediately tried to intercept the horses, but the three escaped and, although the plaintiff followed them up at once and did his best to recover them, they eventually got onto the defendants' railway track and were killed by a train on a bridge.

*Held*, that the plaintiff was not guilty of negligence or of any wilful act or omission in the matter so as to disentitle himself to recover.

*Curran*, for plaintiff. *Clarke*, K.C., for defendants.

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Robson, J.]

[November 4.

RE CANADIAN NORTHERN RAILWAY CO. AND BLACKWOOD.

*Railway company—Expropriation of land for railway—Possession before payment of compensation—Railway Act, R.S.C. 1906, c. 37, s. 217—Board of Railway Commissioners, jurisdiction of.*

An order of the Board of Railway Commissioners for Canada, giving leave to a railway company to construct an extension of a spur track, and authorizing the expropriation of the necessary land is conclusive unless reversed on appeal to the Supreme Court, as to the right of the company to expropriate the land and construct the extension.

A warrant to put the company in possession of the required land before payment of the compensation should, however, not be granted under section 217 of the Railway Act, unless there

is some urgent and substantial need for immediate action in the interest of the railway itself or of the public, and it is not sufficient to shew that the interests of an individual, whose property would be reached by the spur line when built, urgently call for such construction in order that he may profitably carry on his business on such property.

*Re Kingston and Pembroke Ry. Co., and Murphy*, 11 P.R. 304, and *C.P.R. v. Little Seminary of Ste. Therese*, 16 S.C.R. at p. 617, followed.

*Wilson*, K.C., and *G. A. Elliott*, for Blackwood. *Clarke*, K.C., for the railway company.

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## Book Reviews.

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*The Employers' Liability Act of 1880 and the Workmen's Compensation Act, 1906*. By His Honour Judge RUEGG, K.C.; with Canadian notes by F. A. C. REDDEN, of the Ontario Bar, solicitor of the Supreme Court, England. 8th edition. Butterworth & Co., 11 & 12 Bell Yard, London; Canada Law Book Company, Toronto; Cromarty Law Book Company, 1112 Chestnut St., Philadelphia. 1910.

Whilst this is the eighth edition of a work which may claim to be the standard work on this subject in England, it is the first edition in which the Canadian cases on the subject are collected. As Mr. Ruegg says in his preface:—"Decisions upon the Employers' Liability Statute in force in Canada have been added in the form of foot notes and the statutes themselves appear in the appendix. It is hoped that this addition may increase the utility of the book." We have no doubt that this latter remark is true even so far as England is concerned; but, so far as Canada is concerned, it makes a really good book the most useful one we have on this subject.

As our readers are aware the Imperial Employers' Liability Act, 1880 has, with some modification, been followed in the legislation of the English-speaking provinces of the Dominion, and legislation somewhat similar has quite recently come into force in the Province of Quebec; there are, however, some differences in the legislation of the various provinces. In view of this, it has been the aim of the author to make this edition equally useful in all the provinces; whilst, at the same time, its

contents gives a bird's eye view of all the legislation in this country on the subject. The value of this feature will readily be seen, as well by the practitioner seeking for authority, as by those whose duty it is from this general view of the situation to amend the legislation in their respective provinces, by noting the working of the Act in other parts of the Dominion.

It need scarcely be said that the work done by Mr. Redden is most excellent. His well-known accuracy and industry would be a sufficient guarantee as to this. But more than that, an examination of his work in the book before us makes it quite evident that those who seek knowledge on this subject have now before them an exhaustive collection of our authorities so well arranged that the reader can readily find all the law to be had on the subject.

Whilst we may have our own opinion as to the wisdom of some of this legislation, it has been accepted as a fact, and every lawyer who has any business whatever, must be familiar with it. This familiarity can best be obtained from the pages of the volume before us.

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## Law Societies.

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### THE LAW SOCIETY OF ALBERTA.

The triennial election of Benchers of the Law Society of Alberta was held on the 7th ult., the Benchers so elected to take office on first day of this month and to hold office for three years from that date. The following is the list of those elected:—James Muir, K.C., Calgary; W. L. Walsh, K.C., Calgary; C. F. P. Conybeare, K.C., Lethbridge; J. C. F. Bown, K.C., Edmonton; C. M. Biggar, Edmonton; D. G. White, Medicine Hat; George W. Greene, Red Deer; R. B. Bennett, K.C., Calgary; E. P. McNeill, Macleod.

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## Bench and Bar.

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### JUDICIAL APPOINTMENT.

John Lyndon Crawford, Red Deer, Alberta, Barrister-at-law: to be Judge of the District Court of the District of McLeod in the room of His Honour A. A. Carpenter, transferred to the District of Calgary. (Nov. 25, 1910.)

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